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No. _____

In The

Supreme Court of the United States

GDF REALTY INVESTMENTS, LTD.; PARKE PROPERTIES I, L.P.; AND PARKE PROPERTIES II, L.P.,

Petitioners,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After petitioners purchased land near Austin, Texas, the U.S. Fish & Wildlife Service listed as "endangered" six species of insects found only within caves on and around petitioners' land. These tiny subterranean insects have no commercial value and have never been traded in commerce. After FWS asserted that development of petitioners' land would "take" cave insects in violation of the Endangered Species Act, petitioners sought a declaration that FWS's claim of jurisdiction exceeds the limits of the Commerce Clause. The district court upheld jurisdiction on the ground that the proposed commercial use of the property supplied a nexus to interstate commerce. The Fifth Circuit rejected that analysis, holding that to satisfy the Commerce Clause, the regulated conduct (cave insect takes) – not the proposed land use – must substantially affect interstate commerce. The court acknowledged that cave species takes, standing alone, do not affect commerce. Nevertheless, the court upheld FWS's jurisdiction by aggregating the effect of *all takes of all endangered species*. Six judges dissented from denial of rehearing en banc, explaining that such aggregation to justify regulating takes of "wholly intrastate non-economic" species produces "a constitutionally limitless theory of federal protection" that "entirely undercuts *Lopez* and *Morrison*."

The questions presented, as to which the courts of appeal are in disarray, which the Fifth Circuit answered inconsistently with *Lopez* and *Morrison*, and which are of immense practical importance, are as follows:

1. Whether the Fish & Wildlife Service violated the Commerce Clause by regulating "takes" of intrastate, non-economic species under the Endangered Species Act.

2. Whether aggregation of all takes of all endangered species may sustain the regulation of intrastate, non-economic species whose takes, considered alone, do not substantially affect interstate commerce.

RULES 14.1(b) AND 29.6 STATEMENT

Petitioners, GDF Realty Investments, Ltd.; Parke Properties I, L.P.; and Parke Properties II, L.P. are Texas limited partnerships that have never issued shares to the public. They do not have a parent corporation, nor is there any publicly-held company which owns ten percent or more of its stock.

Respondents are: Gale A. Norton, Secretary, United States Department of the Interior; and Steven A. Williams, Director, United States Fish and Wildlife Service.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners GDF Realty Investments, Ltd., Parke Properties I, L.P., and Parke Properties II, L.P. (collectively, "GDF") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, A 1-43) is reported at 326 F.3d 622 (5th Cir. 2003). That court's per curiam order denying GDF's petition for rehearing en banc and the opinion by Judge Jones, joined by Judges Jolly, Smith, DeMoss, Clement and Pickering dissenting from the denial of the petition for rehearing en banc (*id.*, A 75-91) is reported at 362 F.3d 286 (5th Cir. 2004). The opinion of the district court (*id.*, A 44-74) is reported at 169 F.Supp. 2d 658 (W.D. Tex. 2001).

STATEMENT OF JURISDICTION

The decision of the court of appeals upholding the constitutionality of regulations extending the Endangered Species Act to wholly intrastate, non-commercial species was entered on March 26, 2003. The court denied a petition for rehearing on February 27, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. §1254. Jurisdiction in the district court was based on 28 U.S.C. §1331. Jurisdiction in the Court of appeals was based on 28 U.S.C. §1291.

PERTINENT CONSTITUTIONAL PROVISION

The Commerce Clause of the United States Constitution, Article I, §8, cl. 3, provides: "The Congress shall have power . . . [t]o regulate Commerce . . . among the several States."[1]

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[1] Statutory and regulatory provisions relevant to this case are set forth at App., *infra*, A 90-91.

STATEMENT OF THE CASE

The issue in this case is whether the Commerce Clause permits the U.S. Fish and Wildlife Service ("FWS") to regulate "takes" of insect species that inhabit only a few caves and sinkholes in two Texas counties, have no economic value, and have no connection to interstate commerce. FWS has asserted such jurisdiction under the Endangered Species Act ("ESA") in this case and others, asserting that (1) even if the regulated activity ("takes" of cave insects) has no connection to commerce, the proposed commercial use of the land in question supplies the necessary connection, and (2) the regulation can be sustained by aggregating all takes of all endangered species. Appellate decisions adopting these flawed theories raise questions of immense practical and legal importance and threaten to thoroughly undermine this Court's recent Commerce Clause jurisprudence.

In upholding broad federal jurisdiction under the second theory, while properly rejecting the first, the Fifth Circuit seriously misunderstood this Court's precedents, relegating the Commerce Clause to the "intellectual joke" that it had become prior to this Court's decisions in *Lopez* and *Morrison*. Merritt, *Commerce!*, 94 Mich. L. Rev. 674, 691 (1995); *see U.S. v. Lopez*, 514 U.S. 549 (1995); *U.S. v. Morrison*, 529 U.S. 598 (2000). *Lopez* and *Morrison* make clear that Congress may regulate intrastate activity only if that activity substantially affects interstate commerce either alone or, under some circumstances, when aggregated with similar and related economic activities. This Court has *never* upheld a regulation based on the aggregation principle unless the aggregated activity was economic in nature – which in this case it is not. *Morrison*, 529 U.S. at 613. In permitting the bundling of economic and non-economic activity for aggregation purposes, on the theory that all species (including *some* with economic value) form

an "interdependent web," the Fifth Circuit has stripped the Commerce Clause of its most central component – the requirement that regulated activity be commercial or economic in nature. Its holding assures that virtually no scheme of federal regulation will ever fail to pass constitutional muster, provided only that the scheme encompasses some economic activity.

The Fifth Circuit's ruling has deepened serious disagreements among the courts of appeals concerning the proper scope of a major federal statute that affects the use of many millions of acres of land across the Nation. *See Rancho Viejo v. Norton*, 323 F.3d 1062, 1067 & n.2 (D.C. Cir. 2003) (collecting courts' different approaches). Divided panels of the D.C. Circuit have upheld federal regulation of intrastate, non-economic species takes that do not substantially affect commerce on the ground that *regulation* of the takes will produce an effect on commercial development. *Id.* at 1068-69; *Nat'l Ass'n of Homebuilders v. Babbitt* ("*NAHB*"), 130 F.3d 1041, 1048, 1056 (D.C. Cir. 1997) (Wald, J.); *id.* at 1059 (Henderson, J., concurring). A divided panel of the Fourth Circuit and the district court in this case endorsed that analysis. *Gibbs v. Babbitt*, 214 F.3d 483, 495 (4th Cir. 2000); App., *infra*, A 61-63. This Court, however, treated that approach with considerable skepticism in *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159, 173 (2001) ("*SWANCC*"), and the Fifth Circuit correctly rejected it here. Not only would such an approach grant Congress unlimited authority to regulate intrastate activities so long as the regulation is broad or intrusive enough to produce commercial effects, it would also dictate different outcomes in *Lopez* and *Morrison* themselves. *See* App., *infra*, A 24. But the Fifth Circuit rejected that error only to fall into another when it held that intrastate, non-economic cave species takes may be aggregated with all other endangered species in order to create the necessary commercial effect.

Not surprisingly, given the courts of appeals' inability to agree on the appropriate Commerce Clause analysis of regulation of takes of intrastate, non-commercial species and their unwillingness to take *Lopez* and *Morrison* seriously as limits on federal power over local matters, virtually every decision upholding such regulation has provoked a vigorous dissent. No fewer than six judges of the Fifth Circuit dissented from denial of rehearing en banc here (with Judge Edith Jones authoring the dissent), joining an array of distinguished jurists, including Judges Luttig, Roberts, and Sentelle, who have criticized courts' analysis of ESA regulation of localized, non-commercial species.

So long as this disarray among and within courts continues – and time has only sharpened the disagreements – wasteful litigation will proliferate. Absent this Court's review, legal uncertainty will hamper landowners whose properties host even a single example of any of hundreds of intrastate, non-commercial species listed pursuant to the ESA, just as petitioners' twenty-year effort to develop their land has been thwarted. And state and local land use planning will continue to be subjugated, over large swaths of land, to federal regulatory schemes that the Framers never intended to be so intrusive. This Court's intervention is urgently needed.

A. The statutory and regulatory scheme.

The ESA makes it unlawful for any person to "take" any listed endangered species. 16 U.S.C. §1538(a)(1)(B). "Take" is defined in the ESA to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect." 16 U.S.C. §1532(19). "Harm" in the definition of "take" has been expansively defined by FWS to include *indirect* harm to endangered species, including habitat modification such as ordinary land clearing activities. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). FWS administratively defined "harm" to

mean: "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. §17.3.

Neither the take provision nor the harm regulation contain a jurisdictional element limiting their effect to activities substantially affecting interstate commerce. Thus, the ESA makes unlawful any activity that takes – i.e., kills, injures or even modifies habitat of – a listed species wherever it occurs and without an explicit connection to interstate commerce. *Morrison*, 529 U.S. at 608-09.

Violation of the take provision carries serious criminal and civil penalties, including imprisonment. The ESA imposes criminal penalties of imprisonment for up to one year and fines up to $50,000 for knowing violation of the take provision. 16 U.S.C. §1540(b)(1). The ESA also assigns civil penalties of up to $25,000 for each knowing violation of the take provision. 16 U.S.C. §1540(a)(1).

It is the FWS' application of the take provision to several species of local, cave-dwelling insects lacking any commercial value that is at issue in this case.

B. Petitioners' property and the endangered cave insects.

Petitioners[2] in this case are the owners of approximately 216 acres of undeveloped land in western Travis County, just outside the City of Austin. App., *infra*, A 2.

[2] Fred and Gary Purcell are the sole limited partners of Parke Properties I, L.P. and Parke Properties II, L.P., the owners of an undivided 70% interest in the Hart Triangle Property. Fred Purcell is the sole shareholder of FP Properties, Inc., the General Partner of Parke I and Parke II. Gary Purcell is a Federal Magistrate Judge in Oklahoma City, Oklahoma. The remaining 30% interest in the property is owned by GDF Realty Investments, Ltd.

Petitioners' ownership of the 216 acres traces to 1983, when Dr. Fred Purcell and his brother, Judge Gary Purcell, acquired an interest in a larger tract known as the Parke. After acquiring the property, the Purcells invested substantial time and money developing their property, spending millions of dollars constructing water lines, wastewater gravity lines, force mains, lift stations and other utility infrastructure. *Id.* The Purcells dedicated these utilities to the City of Austin and dedicated a right of way adjoining the highway to Travis County. *Id.* Portions of the property have been final platted, and initial approval for development was granted by the City of Austin in 1984. (RX E:320).[3]

For over 15 years, petitioners have been thwarted in their attempts to recover their substantial investment because of FWS's expansive claim of jurisdiction over the property. In 1988 – several years after the Purcells began development – FWS listed several species of insects that live in caves and sinkholes on the petitioners' property (and in a few other nearby caves) as "endangered" under §4 of the ESA, 16 U.S.C. §1533(a)(1). App., *infra,* A 2. The "endangered" cave insects are: (1) Bee Creek Cave Harvestman; (2) Bone Cave Harvestman; (3) Tooth Cave Pseudoscorpion; (4) Tooth Cave Spider; (5) Tooth Cave Ground Beetle; and (6) Kretschmarr Cave Mold Beetle. *Id.*, A 2-3. These almost microscopic (1.4-7mm in size), eyeless creatures live their entire lives underground in caves, have no commercial value, and have never been bought, sold or traded in commerce in any form or fashion. (RX F:690-691).

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[3] As cited herein, "R" is the Record from the Fifth Circuit proceedings and "RX" is the volume of Record Excerpts filed with the Court of Appeals together with the Brief of Appellants. References to the Record Excerpts are in the form: "RX ___", which means Record Excerpts Tab letter ___, followed by page numbers.

The final rule listing the cave insects as "endangered" was adopted on September 16, 1988.[4] 53 Fed. Reg. 36029. FWS' final rule listing the cave insects did not contain any findings of any connection between the cave insects and interstate commerce. *Id.*

C. Petitioners' dedication of preserves for the cave insects and their efforts to obtain an incidental take permit from FWS.

After listing the cave insects as endangered, FWS asserted jurisdiction over petitioners' property, claiming that development would "take" the cave insects in violation of ESA §9(a)(1)(B). App., *infra,* A 4. At FWS' behest, the Purcells undertook surveys to determine what would be required to protect the endangered cave insects. (RX F:690; RX E:321-322). The Purcells hired James Reddell (the scientist recognized as the leading expert on these cave insects) to survey the cave insects and make recommendations for their protection. Following Dr. Reddell's recommendations, the Purcells deeded several caves and over 10 acres of buffer zones surrounding the caves to Texas Systems of Natural Laboratories, Inc. ("TSNL") – a non-profit foundation dedicated to the research of environmental issues. (RX F:692-693; RX E:321-322). Since their dedication, TSNL has protected the cave species in the deeded preserves. (RX E:321-322).

Although the Purcells' dedication of the cave insect preserves initially satisfied FWS, the agency later changed positions and has for a decade and a half thwarted the development of the petitioners' property, ultimately resulting in petitioners' filing for bankruptcy. (RX E:322-327); App., *infra,* A 6-7.

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[4] Previously considered to be the same as the Bee Creek Cave Harvestman, the Bone Cave Harvestman was listed as a separate "endangered" species on August 18, 1993. 58 Fed. Reg. 43818.

FWS used various means to achieve this end. FWS threatened Dr. Purcell with criminal prosecution for violation of the take provision. His alleged "crime" consisted of clearing brush and trash off of his property. App., *infra,* A 4. On numerous occasions spanning a decade, FWS prevented sales of various tracts of the petitioners' property by asserting that construction on the property would violate the ESA take provision. (RX E:327). Perhaps worst of all, when petitioners went to FWS to obtain §10a "incidental take" permits – permits which FWS had earlier assured Federal District Judge Sam Sparks would not even be necessary to develop certain large tracts of petitioners' property and which, otherwise, could be issued if sought – FWS deliberately refused to act on those permit applications. *GDF Realty, Ltd., et al. v. United States, et al.*, No. A 98 CA 772 SS, slip op. at 6 (W.D. Tex. June 7, 1999).

After petitioners filed their incidental take permit applications, they met with FWS officials numerous times with development proposals. (RX E:326-328). Each time, petitioners sought to satisfy FWS's concerns by scaling back their development plans. Always unsatisfied, FWS officials made increasingly onerous demands for additional "dedications" of petitioners' land culminating in a July 21, 1998, meeting with FWS official David Frederick in which Frederick produced a map of the 216 acres indicating that development was prohibited on all but a few meager, isolated tracts of land.[5] (RX E:327-328). In that same meeting, Frederick also announced that FWS would deny

[5] Frederick's map prohibited *any development whatsoever* on Tracts A, B, F & G. Development was also prohibited on a 40-acre portion of Tract C (74 acres total), and a 37.3-acre portion of Tract D (47 acres total), which FWS labeled on its map as the "NON-DEVELOPMENT AREA." According to the FWS map, limited development could go forward only on Tract E, a parcel consisting of steep canyons and which is inaccessible by road. (RX E:327-328).

all of the §10(a) permits. (RX E:328). Although it was now certain that FWS would not allow development (contrary to their earlier representation to Judge Sparks) by granting the §10(a) permits, FWS refused to formally deny the permit applications in writing, which would allow the petitioners to seek judicial relief. (RX E:328-329).

Petitioners made numerous unsuccessful attempts to get FWS to formally act on their permit applications. (RX E:328-329). With foreclosure looming, petitioners filed suit to force FWS to act on the applications. *GDF Realty, Ltd., et al. v. United States, et al.*, No. A 98 CA 772 SS (W.D. Tex. June 7, 1999). The district court held that the applications were de facto denied and condemned the FWS's "intentional dela[y]" in ruling upon them as "totally irresponsibl[e]." "To force the plaintiffs into economic damage by intentionally delaying a ruling on their applications, a ruling to which they are legally entitled, is *simply wrong*." *Id.* at 6 (emphasis added).

D. Petitioners' challenge to FWS' claimed jurisdiction over cave insect takes and the district court's ruling.

Unable to obtain permits, GDF filed this suit against the Secretary of Interior and Director of FWS. GDF sought a declaration that Congress, through its delegation to FWS, exceeded its authority under the Commerce Clause by asserting jurisdiction over the takes of intrastate, noncommercial cave insects.

The parties submitted the case on cross motions for summary judgment. Judge Sparks granted the government's motion and denied GDF's motion. App., *infra*, A 74. The district court held that the ESA take provision is valid under the "substantial effect on interstate commerce" category of congressional authority. *Id.*, A 61-71. In framing the "substantial effects" inquiry, the district court focused on GDF's proposed use of the property, rather than the activity actually regulated by the statute – takes

of the cave insects. *See, e.g., Id.*, A 61-65. "[I]t is obvious that the effect of building Wal-Marts and apartment complexes, in the aggregate, quite substantially affects interstate commerce." *Id.*, A 64.

E. The Fifth Circuit decision.

The Fifth Circuit affirmed on "wholly different reasoning." App., *infra*, A 77. It rejected the district court's focus on GDF's proposed use of the property, instead holding that the substantial effects inquiry must center on the regulated activity – cave insect takes. *Id.*, A 21. Observing that each of the three *Lopez* categories recognizes Congress' power to regulate "where the *object of regulation* relates to interstate commerce: channels, instrumentalities, or activities," *id.*, A 22 (emphasis in original), the court held that: "Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that, concerning substantial effect *vel non,* Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce." *Id.*, A 22. "In expanding its scope-inquiry to plaintiffs' commercial motivations," the court of appeals said the district court misread *Lopez, Morrison* and Fifth Circuit precedent. App., *infra*, A 23.

The court of appeals also rejected other arguments made by the government and adopted by other courts of appeals, including the Fourth Circuit in *Gibbs*. First, the government argued that evidence of scientific travel and publication "demonstrates the Cave Species 'play a role in interstate commerce.'" App., *infra*, A 28. FWS cited evidence that scientists interested in the cave insects have traveled to Texas to study them, some cave insects have been transported to and from museums in five states, and articles about cave insects have been published in scientific journals. *Id.* Rejecting the government's argument, the court of appeals held that "[t]o the extent FWS contends that the loss of the Cave Species would affect the

scientific travel or publication industries, it offers no evidence that it would substantially do so. In fact, the minimal evidence presented by FWS indicates such an effect would be negligible." and "far too attenuated to pass muster" under *Morrison*. *Id.*, A 28-29.

Second, the government argued that "future commercial benefits derived from the Cave Species will be significant enough to substantially affect interstate commerce." App., *infra*, A 29. The Fifth Circuit rejected this claim of future benefits as mere "conjecture." *Id.*, A 30. Moreover, the court found the *rationale* of Commerce Clause jurisdiction through speculative future benefits flawed because "[t]he *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster." *Id.* (emphasis in original).

The court of appeals thus held that cave insect takes, considered alone, do not substantially affect interstate commerce. However, the court affirmed FWS's jurisdiction by aggregating *all takes of all endangered species* to locate a substantial effect on interstate commerce. App., *infra*, A 43. In so doing, the court of appeals employed a rationale at odds with other parts of its opinion and with this Court's opinions in *Lopez* and *Morrison*. Although the court of appeals earlier stated that "in a sense, Cave Species takes are neither economic nor commercial," for purposes of aggregation, it reversed field and found that the ESA take provision is economic and the ESA – a quintessential wildlife protection statute – is "an economic regulatory scheme." *Id.*, A 31. Applying this contradictory analysis, the court applied *Wickard*-style aggregation of all endangered species takes, *some* of which substantially affect interstate commerce, to uphold the take provision's application to the non-commercial cave insects. *Id.*, A 32-36.

F. The dissent from denial of rehearing en banc.

Six judges of the Fifth Circuit – almost half of the court's active members – dissented from the denial of rehearing en banc. Calling the case both "significant" and in conflict with this Court's Commerce Clause jurisprudence, Judge Edith Jones authored the dissent. Judge Jones' dissent contrasts the "generally excellent ... discussion" in the first part of the panel's opinion (which finds that cave insect takes, alone, do not substantially affect interstate commerce) (App., *infra*, A 84-85) with the "confusing and self-contradictory" discussion of aggregation – the panel's approval of which "would not only sustain every conceivable application of the ESA, but entirely undercuts *Lopez* and *Morrison*." *Id.*, A 80.

Judge Jones' dissent exposes the significant contradictions between the panel's willingness to aggregate cave species takes with all other takes to find the necessary commercial effect, where it had already found that "Cave Species takes are neither economic nor commercial;" that there is no present link between cave insect takes and commerce ("there is no historic trade in the Cave Species, nor do tourists come to Texas to view them"); and that any future link is unacceptable surmise ("[i]f the speculative future medical benefits from Cave Species makes their regulation commercial, then almost anything would be"). App., *infra*, A 83. The dissent observes that the panel's use of aggregation premised on the "interdependent web" of all species allows a "remote, speculative, attenuated, indeed more than improbable connection to interstate commerce" to supply the constitutional basis for regulation, thereby giving "these subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victim in *Morrison*." App., *infra*, A 76. In so doing, the panel had allowed "Congress, for the first time in U.S. history ... to aggregate purely intrastate, non-economic activity," (App., *infra*, A 84) and had "trample[d] the precept" that "federal legislation under the Commerce

Clause must have a limiting principle so as not to obliterate the distinction between that which is truly national and that which is local." *Id.*, A 87.

REASONS FOR GRANTING THE PETITION

This Court should grant review because the Fifth Circuit's decision "entirely undercuts *Lopez* and *Morrison*" while sanctioning federalization of land use issues traditionally reserved to the States and their localities, and because the lower courts are in disarray as to the federal government's Commerce Clause authority to regulate takes of intrastate, non-commercial species – an issue of enormous practical importance to landowners and regulators throughout the country.

I. The Fifth Circuit decision conflicts with this Court's Commerce Clause jurisprudence in *Lopez* and *Morrison*.

Lopez identified three broad categories of activity that Congress has the authority to regulate pursuant to the commerce power: 1) The use of the channels of interstate commerce; 2) The instrumentalities of interstate commerce, or persons or things in interstate commerce; and 3) Those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce. *Lopez*, 514 U.S. 558-59. As the court of appeals recognized, the regulated activity here involves neither the channels of interstate commerce, nor instrumentalities or objects in interstate commerce. App., *infra*, A 10. Thus, it can only be sustained under the third category of commerce power.

In *Lopez* and *Morrison*, this Court identified four factors in analyzing the limits of the "substantial effects" test:

1. Whether the statutory provision, by its terms, regulates commercial or economic activity.

2. Whether the statutory provision contains a jurisdictional element which ensures that the regulated activity has an explicit connection with or effect on interstate commerce.
3. Whether the statutory provision is supported by express Congressional findings regarding the effects the regulated activity has upon interstate commerce.
4. Whether the link between the regulated activity and a substantial effect on interstate commerce is so attenuated as to leave no logical stopping point to the commerce power.

Faithful application of the four factors considered by this Court in finding the Gun-Free School Zones Act ("GFSZA") and Violence Against Women Act ("VAWA") outside the commerce power compels the same conclusion here – that regulating takes of local, non-commercial cave insects exceeds the commerce power.

A. The Fifth Circuit's aggregation analysis conflicts with this Court's recognition that only economic activity has heretofore been aggregated.

The first and most important factor in analyzing the limits of the commerce power is whether the regulated activity is commercial or economic in nature. As this Court pointed out in *Morrison*, "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." 529 U.S. at 613. It is thus dispositive that, as the Fifth Circuit found, "Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture." App., *infra*, A 31. Under the Commerce Clause, non-economic takes of the cave insects cannot be regulated by the federal government.

The Fifth Circuit panel avoided this result by aggregating non-economic takes of cave insects with all takes of

all endangered species, which produces (petitioners concede) a substantial effect on interstate commerce. This use of the aggregation principle – which would completely eliminate as-applied Commerce Clause challenges to ESA regulation, *see*, App., *infra*, A 80 (Jones dissent) – is impermissible. In *Lopez*, this court canvassed its Commerce Clause jurisprudence and concluded that in those cases in which the Court sustained the use of aggregation to arrive at substantial effects on interstate commerce, what was aggregated was commercial or economic activity. *See* 514 U.S. at 559-560 (discussing *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) (coal mining); *Perez v. United States*, 402 U.S. 146 (1971) (credit transactions); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (restaurants); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (inns and hotels)). Never has this Court countenanced an expansive use of aggregation to reach entirely non-economic conduct.

Even *Wickard v. Filburn*, 317 U.S. 111 (1942) – which this Court has described as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity" (*Lopez*, 514 U.S. at 560) – focused not on the aggregate commercial effects of the *class* of activity to which regulated conduct belongs, but on the aggregate commercial effect of the *specific activities* at issue. This Court in *Wickard* did not uphold federal regulation of wheat produced for home consumption on the theory that agricultural production or transactions as a whole substantially affect commerce – which it easily could have done were the aggregation theory applied by the Fifth Circuit in this case a correct approach to Commerce Clause analysis. Instead, this Court in *Wickard* engaged in a particularized inquiry into the aggregate commercial effects of on-farm wheat production. It concluded, for example, that "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions," and that even "assum[ing] that it is never marketed, it supplied a need of

the man who grew it which would otherwise be reflected by purchases on the open market," so that home-grown wheat "in this sense competes with wheat in commerce." 317 U.S. at 128. The Court would hardly have engaged in this more burdensome inquiry were the Commerce Clause question simply whether agricultural production or transactions in general substantially affected commerce. As this Court confirmed in *Morrison*, in *Wickard* and every one of its progeny in which federal regulation has been sustained by this Court, "the regulated activity was of an apparent commercial character." 529 U.S. at 611.

Nevertheless, the Fifth Circuit panel upheld the use of aggregation based on its conclusion that the ESA is "an economic regulatory scheme" of which "the regulation of interstate takes of the Cave Species is an essential part." App., *infra*, A 36. The panel's conclusion is based on three rationales, none of which withstand scrutiny.

First, the Fifth Circuit cited ESA legislative history regarding the "'incalculable' value of the genetic heritage that might be lost absent regulation" and imported legislative history from a precursor of the ESA[6] regarding the commercial value that might be derived in the future from controlled exploitation of species. App., *infra*, A 32-33. The flaw in the court's reliance on speculative commercial benefits from endangered species is well stated elsewhere in the court's opinion: "This contention, whatever its merits may ultimately be, runs afoul of the attenuation consideration. The *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster." *Id.*, A 30 (citing *Morrison*, 529 U.S. at

[6] In *Lopez*, this Court noted that the importation of legislative history from previous enactments is inappropriate. 514 U.S. at 563.

612) (emphasis in original). If all that is required to show that a statute is "economic" – thereby allowing aggregation – is a belief that a statute may have some speculative future benefit to commerce, then there is no stopping point to the commerce power.

Second, the court reasoned that the "majority of takes would result from economic activity." App., *infra*, A 33. However, as the court correctly pointed out elsewhere, economic activity causing the takes is not the subject of the regulation (*id.*, A 23):

> [T]he district court in this case looked primarily beyond the regulated conduct – Cave Species takes – in order to assess effect on interstate commerce. It looked to plaintiffs' planned commercial development of the property where the takes would occur. True, the *effect* of regulation of ESA takes may be to prohibit such development in some circumstances. ***But, Congress, through ESA, is not directly regulating commercial development.*** (emphasis added).

Third, the court observed that the ESA is "truly national" in scope. App., *infra*, A 34. This rationale fails because simply identifying a problem and stating that it is national in scope does not convert a statute regulating that problem into a commercial regulation. If that were the case, then the "national problems" addressed by the GFSZA and VAWA would have passed Commerce Clause muster. The Commerce Clause permits the federal government to regulate matters that substantially affect interstate commerce, not all "national" problems regardless of their connection to commerce.

A fair reading of the ESA as a whole indicates that it is not a scheme of commercial regulation – it is a statutory scheme designed to protect endangered wildlife, some of which has substantial effects on interstate commerce and much of which crosses state lines. The ESA provides a process for listing endangered species and identifying their

critical habitat, 16 U.S.C. §1533; provides authority to Federal agencies to protect listed species by purchasing land for preserves, 16 U.S.C. §1534; and directs all Federal agencies to consult with FWS to determine whether an agency action will "jeopardize the continued existence of any endangered species . . . or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. §1536; *see also Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). The ESA also sets up a system of coordination with state and foreign governments to provide funding and collaboration to conserve listed species. 16 U.S.C. §§1535 & 1537. Finally, the ESA prohibits certain acts, including taking a listed species, 16 U.S.C. §1538, while providing for permitting and enforcement. 16 U.S.C. §§1539 & 1540.

These provisions are valid regulations under various federal powers (*e.g.*, spending, property) and under the Commerce Clause may certainly be applied to species that are economic or interstate. But what is absent from the ESA is an overall scheme to regulate a commercial market. The ESA stands in sharp contrast to the regulation of congressionally-defined commercial markets for wheat (*Wickard*), surface coal mining (*Hodel*), credit transactions (*Perez*), restaurants (*Katzenbach*), and inns & hotels (*Heart of Atlanta*), to name just a few. Absent such a congressionally-defined commercial market, this Court has *never* sustained the use of aggregation. This case presents no reason to depart from this Court's limitations on the aggregation principle such that, "Congress, for the first time in U.S. history, is authorized to aggregate purely intrastate, non-economic activity." App., *infra*, A 84.

B. The take provision lacks a jurisdictional element to contain it within constitutional bounds.

The second factor emphasized by this Court in *Lopez* and *Morrision* in holding the GFSZA and VAWA to be beyond the commerce power was the lack of an "express jurisdictional element" to "insure, through case by case

inquiry, that the [regulated activity] affects interstate commerce." *Lopez*, 514 U.S. at 562. In stark contrast to other provisions in Section 9 of the ESA,[7] the take provision lacks any jurisdictional element that narrows its application to constitutional limits. Had the provision contained language limiting its reach to conduct with a substantial effect on interstate commerce, it would not have applied to takes of the cave insects, for as the Fifth Circuit held, those species by themselves have "no commercial market" (App., *infra*, A 4) and their "takes are neither economic nor commercial." App, *infra*, A 31. It would be ironic if regulation that could not pass muster under an express jurisdictional element could survive Commerce Clause scrutiny where such an element was omitted. *Cf. Jones v. United States*, 529 U.S. 848, (2000) (construing jurisdictional element of arson statute narrowly to avoid constitutional problems created by extending commerce power to attenuated connections to commerce – *e.g.*, out of state natural gas, insurance and financing).

C. The ESA and its take provision are not supported by findings regarding "substantial effect on interstate commerce."

When Congress enacted the ESA in 1973, it made no express findings regarding the effect (substantial or otherwise) that takes of endangered species have on interstate commerce, nor did it make any such findings for the ESA generally. *See* 16 U.S.C. §1531(a) (setting forth

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[7] Section 9(a)(1)(E) of the ESA, 16 U.S.C. §1538(a)(1)(E), makes it unlawful to "deliver, receive, carry, transport, or ship in interstate or foreign commerce" and "in the course of a commercial activity" any listed species. Sections 9(a)(1)(F) and 9(a)(2)(C) & (D) also contain express "interstate or foreign commerce" jurisdictional elements. 16 U.S.C. §1538(a)(1)(F), (a)(2)(C),(D).

the findings made by Congress when it enacted the ESA, none of which address substantial effect on interstate commerce). Thus, the ESA is not a statute in which Congress declared that "the entire class of [regulated] activities affects commerce." *Maryland v. Wirtz*, 392 U.S. 183, 192 (1968). *Compare* Surface Mining Control and Reclamation Act, 30 U.S.C. §1201, upheld in *Hodel v. Virginia Surface Mining & Reclam. Assn.*, 452 U.S. 276-81 (1981). Similarly, the ESA's legislative history provides no evidence regarding the effect that takes of endangered species have on interstate commerce. *See* 1973 U.S.C.C.A.N. 2989. Obviously, therefore, Congress also made no findings that takes of intrastate species that are not traded in commerce and have no economic value nevertheless substantially affect interstate commerce.

Where there are no congressional findings, the courts must scrutinize carefully the constitutional sufficiency of the nexus to interstate commerce, and as to the cave insects, as the court below acknowledges, there is none.

D. The Fifth Circuit's analysis provides no logical stopping point to the commerce power.

The Fifth Circuit's analysis of the commerce power is further in conflict with *Lopez* and *Morrison* because it provides no logical limits on that power. The court's boundless holding is premised on the idea that takes of the cave insects threaten the "interdependent web of all species" which threatens "the ecosystems upon which we and other species depend." App., *infra*, A 35. The flaws in this approach are well stated in Judge Jones' dissent: "[T]his is no more than the 'but-for-causal chain' approach twice rejected by the Supreme Court in *Lopez* and *Morrison*. . . . An even more obvious dissonance between the panel opinion and *Lopez*, *Morrison* and the Constitution is that the Commerce Clause regulates commerce, not ecosystems." *Id.*, A 86.

Although the Fifth Circuit acknowledged this Court's concern that Commerce Clause rationales have some limiting principle so as not to obliterate the distinction between that which is truly national and that which is local, the court's conclusion "tramples that precept." App., *infra*, A 87. The court's conclusory statement that its "interdependent web" approach "will not allow Congress to regulate land use or wildlife preservation" ignores the practical reality that federal jurisdiction over local endangered species permits the FWS to act as a federal land use authority. *Id.*, A 36 (citing *Morrison*, 529 U.S. at 612-13). As Judge Jones correctly points out, "Once the FWS designates a species as endangered, the Government has functional control over the land designated as its habitat. If such authority is not justified by a federal interest in regulating interstate commerce, it 'would result in a significant impingement of the States' traditional and primary power over land and water use.' *Solid Waste Agency,* 531 U.S. at 173-74." App., *infra*, A 87.

Moreover, federal jurisdiction over harm to cave insects through attenuated connections to commerce (*i.e.*, *other species*' connections with commerce) simply cannot be squared with this Court's attenuation analysis in *Lopez* and *Morrison*. *See also Gulf Oil Co. v. Copp Paving Co.*, 419 U.S. 186, 198 (1974) (a "chain of causation" that "ha[d] no logical endpoint" resulted in "nebulous" jurisdictional limits and no acceptable "nexus" to commerce); *FERC v. Mississippi*, 456 U.S. 742, 758 n.23 (1982) (Congress may not "regulate in an area that is only tangentially related to commerce"). As the six dissenting judges of the Fifth Circuit pointedly observe: "Chief Justice Marshall stated in *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821), that Congress has no general right to punish murder or felonies generally. Surely, though, there is more force to an 'interdependence' analysis concerning humans, and thus a more obvious series of links to interstate commerce, than there is to 'species.' Yet the panel's 'interdependent web' analysis of the Endangered Species Act gives these subterranean bugs federal protection that was

denied the school children in *Lopez* and the rape victim in *Morrison.*" App., *infra*, A 76.

The Fifth Circuit's decision upholding FWS's authority to regulate intrastate, non-commercial cave insects is in conflict with *Lopez* and *Morrison*. Applied more generally, the Fifth Circuit's reasoning would eliminate all Commerce Clause limits on federal power. This Court's intervention is urgently required.

II. The courts of appeals are in disarray regarding the scope of Commerce Clause authority to regulate takes of intrastate, non-economic species.

The uneven trajectory of this case reflects the lower courts' complete disarray regarding the scope of the federal government's Commerce Clause authority to regulate takes of intrastate, non-economic species. Just as in this case, courts nationwide disagree as to the scope of activity that can be considered for determining substantial commercial effect. Some courts look only to the activity – species takes – expressly regulated by the terms of the statute. Other courts, however, focus on the motivation of the actor or the collateral effects of the regulation itself on development, tourism, and scientific study.

Due in part to this disagreement over the scope inquiry, courts have split on whether the activity regulated by the take provision is economic. This split has significant implications for aggregation. If a court determines that the species take is economic, aggregation can be used to uphold Commerce Clause authority. If the regulated activity is not economic, lower courts have further disagreed as to whether non-economic activity can be aggregated. This wide-ranging disagreement between the lower courts has resulted in a bewildering range of rationales that are confusing and contradictory.

These disagreements are not mere theoretical concerns. Because of the ESA's deep intrusion into the ordinary lives of landowners, the implications of this disagreement take on a very real dimension. Landowners undertaking everyday activities on their property – activities such as grazing,[8] irrigating crops,[9] or even building a fence[10] – face potential imprisonment for violation of the take provision. One need look no further than this case for an example. FWS threatened Fred Purcell with *criminal* prosecution under the ESA for simply clearing trash and brush off of his property. App., *infra*, A 4. This issue – and this case – cry out for the Court to step in and bring clarity and certainty to the scope of FWS' authority and a landowner's potential criminal and civil liability for everyday activities that may inadvertently harm endangered species or merely modify their habitat.

A. The courts disagree as to what activity should be considered for determining substantial effect.

In analyzing the limits of Commerce Clause authority, the initial inquiry centers on what activity a court can consider for the "substantial effects" test. The courts of appeals are deeply divided on this issue, employing different, mutually exclusive rationales.

1. The disagreements in this case highlight the contradictory reasoning used by courts on this issue.

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[8] *See, e.g., Palila v. Hawaii Dep't of Land & Nat'l Res.*, 639 F.2d 495 (9th Cir. 1981).

[9] *See, e.g., U.S. v. Glenn-Colusa Irrigation Dist.*, 788 F. Supp. 1126 (E.D. Cal. 1992) (irrigation district enjoined from pumping water through intake pipes causing take of endangered species).

[10] *Rancho Viejo*, 323 F.3d at 1065 (building fence modifies habitat of arroyo toad causing take under §9).

Although the regulatory provision at issue prohibits takes of endangered species, the district court below expanded the scope inquiry beyond the effect of cave insect takes on interstate commerce. Instead, it looked to GDF's proposed use of the property to locate a nexus with interstate commerce. Thus, in a case regarding take of endangered cave insects, the district court thought it proper to consider the proposed construction of a Wal-Mart for determining substantial effect. "Plaintiffs mistakenly focus only on the commercial aspects (or, in their view, the complete lack thereof) of the Cave Species. However, the activity regulated in this case is not simply the Cave Species. It is an alleged take of the Cave Species through plaintiffs' development of the Property. Plaintiffs cannot simply ignore the commercial nature of their activity." App., *infra*, A 62.

Citing this Court's opinion in *SWANCC*, 531 U.S. at 173, the Fifth Circuit expressly rejected the district court's expanded scope inquiry, holding that a reviewing court must look at the activity regulated by the express terms of the provision in question. Thus, because building a Wal-Mart (and regulation of commercial development generally) is not within the express terms of the regulated activity, the Fifth Circuit focused directly on the effect of cave insect takes and held that they were neither economic nor commercial. App., *infra*, A 21-27.

2. The circuits are split on this issue. The Fifth Circuit's reasoning in this case is flatly at odds with the D.C. Circuit's recent decision in *Rancho Viejo v. Norton*. Just as the district court in this case focused on building a Wal-Mart instead of cave insect takes, the D.C. Circuit adopted its own version of the "Wal-Mart rationale" to uphold the take provision's application to the arroyo toad – an intrastate, non-economic endangered toad. The D.C. Circuit expanded "the regulated activity" to include actions and motivations outside the express terms of the take provision. *Rancho Viejo,* 323 F.3d at 1072-73. Specifically, the D.C. Circuit held that "the regulated activity is

[Rancho Viejo's] construction of a 202 acre commercial housing development." *Id.* at 1068.

By expanding the "substantial effects" inquiry beyond the express terms of the take provision, the D.C. Circuit held that takes of the arroyo toad substantially affect interstate commerce: "To survive Commerce Clause review, all the government must establish is that 'a rational basis exist[s] for concluding that a regulated activity sufficiently affect[s] interstate commerce.' [] And there can be no doubt that such a relationship exists for costly commercial developments like Rancho Viejo's." *Id.* at 1070 (citation omitted). *Rancho Viejo's* holding reaffirmed the D.C. Circuit's earlier opinion in *NAHB v. Babbitt*, 130 F.3d 1041. In *NAHB*, the D.C. Circuit held that harm caused to habitat of an intrastate insect (the Delhi Sands Flower-loving Fly) by construction of a hospital and freeway and related use of building materials was a sufficient connection with interstate commerce. *Id.*, 130 F.3d at 1056 (Wald, J); *id.* at 1059 (Henderson, J., concurring); *see also Gibbs v. Babbitt*, 214 F.3d 483, 495, 497 (4th Cir. 2000) (finding a connection with interstate commerce through the commercial motivations of farmers and others).

Every post-*Lopez* case analyzing the limits of Commerce Clause power to regulate takes of intrastate, non-economic species has resulted in sharply divided courts of appeals, with opinions based on inconsistent and contradictory rationales, over the strong dissents of some of the nation's most distinguished jurists. In *NAHB,* a plurality of the court upheld the application of the take provision to an intrastate, non-commercial species, but the majority were unable to agree on a rationale. The various rationales offered by the plurality and their conflict with *Lopez* drew a strong dissent from Judge Sentelle, who found it "unsurprising" that the plurality could not agree on a rationale because "this effort to regulate does not fit any of [the three *Lopez*] categories" of commerce authority. *NAHB*, 130 F.3d at 1062.

Rancho Viejo's post-*Morrison* reaffirmation of *NAHB* caused Judge Sentelle to dissent again, noting that the decision "broadens" the "divergence" between *NAHB* and *Lopez* and *Morrison* as well as being "conspicuously in conflict" with the Fifth Circuit's decision in *GDF*. *Rancho Viejo*, 334 F.3d 1158 (D.C. Cir. 2003) (dissenting from denial of reh'g en banc). Judge Roberts would have reheard the case en banc as well, noting the inconsistency between the panel's broad substantial effects analysis ("whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so") and *Lopez* and *Morrison* as well as "the conflict[] with the opinion of a sister circuit [in *GDF*]." *Id.* (emphasis in original). In *Gibbs*, the Fourth Circuit split 2-1 over the vigorous dissent of Judge Luttig, who found the majority's analysis so far out of step with *Lopez* and *Morrison* that it is "not even arguably sustainable." 214 F.3d at 507.

The reasoning split between the Fifth Circuit in *GDF Realty* and the D.C. Circuit in *Rancho Viejo* (as well as *NAHB* and the Fourth Circuit in *Gibbs*) is clearly cast because the courts reach diametrically opposed positions on the same issue. *GDF* holds that commercial development activity causing takes of endangered species does not count for the purposes of determining substantial effect; *Rancho Viejo* holds that it does.

The reasoning split creates a split in results as well. Thus, although *GDF Realty* and *Rancho Viejo* involved similar Commerce Clause challenges (application of the ESA take provision to intrastate, non-commercial species), they reach different results on whether takes of those species, considered alone, substantially affect interstate commerce. *GDF* holds that cave insect takes alone do not substantially affect interstate commerce; *Rancho Viejo*

holds that they do.[11] The different results reached by the circuits are *solely* attributable to the reasoning employed by the courts. They can in no way be attributed to differences in evidence regarding these species.

Finally, the divergent rationales create different constitutional standards between the circuits. The broad "Wal-Mart rationale" used by the district court below and the D.C. Circuit "would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors" which would eviscerate any limits on Congress' authority to "regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce." App., *infra*, A 23. Conversely, the Fifth Circuit's expansive aggregation rationale prevents "as-applied" challenges when the take provision reaches "too far." App., *infra*, A 88-89. Thus, "the lone hiker in the woods, or the homeowner who moves dirt in order to landscape his property, though he takes [the endangered species]" is liable for take in the Fifth Circuit, but not the D.C. Circuit, even though the action "does not affect interstate commerce." *Rancho Viejo*, 323 F.3d at 1080 (Ginsburg, J., concurring).

The reasoning split between the circuits in this critical component of Commerce Clause analysis – determining what activity or conduct "counts" for the purposes of substantial effect – is clearly cast in the courts' respective decisions, is substantial in scope because of its often case-dispositive nature and is, therefore, ripe for resolution by this Court.

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[11] The Fifth Circuit decision upholding the take provision's application to non-commercial cave insects is solely premised on aggregation of all takes of all endangered species. App., *infra*, A 34.

B. The courts of appeals disagree whether non-economic activity can be aggregated.

The second issue on which the courts of appeals are in disarray is whether non-economic activity can be aggregated. The conflicting rationales in this case again serve as a good example. Relying on *NAHB* and *Gibbs*, the district court below used an expanded scope inquiry (*e.g.*, building a Wal-Mart on petitioners' property) to find the regulated activity "economic" and allowed aggregation. App., *infra*, A 61-64. The Fifth Circuit panel, by contrast, found cave insect takes non-economic standing alone, but allowed aggregation on the ground that such takes are an essential part of an "economic" regulatory statute. *Id.*, A 28-36. The six dissenting judges disagreed, noting that this Court has only sustained Commerce Clause regulation under the aggregation principle when "the regulated activity was of an apparent commercial character." *Morrison*, 529 U.S. at 611; *see* Part I.A., *supra*. The dissent also pointed out the panel's logical dissonance: "The panel attempts to convert the ESA to an economic regulatory statute by opining that the majority of species takes would result from economic activity, and 'the Cave Species takes would occur as a result of plaintiffs' planned commercial development.'" App., *infra*, A 85. Yet as the dissent notes, the panel had "rejected this argument earlier, when it found that the regulated activity is the take, not the planned commercial land development." *Id.*

This dissonance regarding aggregation of non-economic activity is evident elsewhere. In *NAHB*, Judge Wald, writing for the plurality, accurately conceded that the regulated activity is, "local and is not regarded as commerce." *NAHB*, 130 F.3d at 1049, fn.7 (internal citation omitted).[12] Nevertheless, she applied aggregation to

[12] *See also, NAHB*, 130 F.3d at 1064 (Sentelle, J., dissenting) (take provision applied to intrastate fly "does not control a commercial

(Continued on following page)

permit regulation of intrastate, non-economic species. 130 F.3d at 1049. Judge Sentelle disagreed in dissent, offering a persuasive explanation of why *Wickard* does not support aggregation here. *Id.* at 1066-67. In her concurrence, Judge Henderson did not expressly take a position regarding Judge Wald's aggregation rationale. Yet she reached the same result by relying on the ESA's protection of "biodiversity" and the "interconnectedness of species and ecosystems." *Id.* at 1058-59. The uncertain scope of this alternative "biodiversity" approach, which the D.C. Circuit declined to apply in *Rancho Viejo*, 323 F.3d at 1067, only exacerbates the confusion over what limits apply (if any) to federal power over intrastate, non-economic species.[13]

The Fifth Circuit's expansive aggregation rationale creates additional conflict by stripping away limits on the commerce power that even the D.C. Circuit approaches preserve. As Judge Jones' dissent states, the panel's rationale forecloses "as-applied" challenges when the take provision reaches "too far." App., *infra*, A 88-89.

The divergent aggregation rationales in ESA cases are evident elsewhere. Outside the context of the ESA, other courts of appeals have differed on how to apply *Wickard* and whether non-economic activity can be aggregated.[14]

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activity, or an activity necessary to the regulation of some commercial activity. Neither killing flies nor controlling weeds nor digging holes is either inherently or fundamentally commercial in any sense.")

[13] *See also*, *Gibbs*, 214 F.3d at 493 (applying aggregation to uphold FWS regulation based on economic nature of ESA as measured by potential effects on tourism, agriculture and historic trade in red wolf pelts – none of which were the subject of the challenged regulation).

[14] *Compare: U.S. v. McCoy*, 323 F.3d 1114 (9th Cir. 2003) (rejecting aggregation of intrastate possession of child pornography) with *U.S. v. Rodia*, 194 F.3d 465 (3rd Cir. 1999) (reaching opposite conclusion); *U.S. v. Stewart*, 348 F.3d 1132 (9th Cir. 2003) (rejecting aggregation in case involving intrastate possession of homemade machine gun) with *U.S. v. Kenney*, 91 F.3d 884 (7th Cir. 1996) (reaching opposite conclusion); *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003) (rejecting aggregation

(Continued on following page)

Given this division over whether and (if so) to what extent non-economic activity can be aggregated, this Court's guidance is urgently required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2004

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of intrastate possession of medical marijuana) with *Proyect v. U.S.*, 101 F.3d 11 (2nd Cir. 1996) (reaching opposite conclusion).

326 F.3d 622

United States Court of Appeals,
Fifth Circuit.

GDF REALTY INVESTMENTS, LTD.;
Parke Properties I, L.P.; Parke Properties II, L.P.,
Plaintiffs-Appellants,

v.

Gale A. NORTON, Secretary, U.S. Department of the Interior; Marshall P. Jones, Director U.S. Fish and Wildlife Service, Defendants-Appellees.

No. 01-51099.

March 26, 2003.

Appeal from the United States District Court for the Western District of Texas.

Before DAVIS, BARKSDALE and DENNIS, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

The Endangered Species Act of 1973, 16 U.S.C. § 1531, *et seq.* (ESA), contains a "take" provision, 16 U.S.C. § 1538(a)(1)(B). For this challenge to Congress' Commerce Clause power, U.S. Const. art. I, § 8, cl. 3, at issue is whether ESA's take provision is unconstitutional *as applied* to six species of subterranean invertebrates found only within two counties in Texas (Cave Species). Central to this question is whether, to demonstrate the requisite substantial effect on interstate commerce, Cave Species "takes" may be aggregated with those of all other endangered species. They can be; the judgment is AFFIRMED.

I.

In 1983, Dr. Fred Purcell and his brother purchased an interest in 216 acres in Travis County, Texas, near the City of Austin (the property). The property (lying within approximately 1,200 acres known as the Parke) consists of seven tracts in which the Purcells, as the limited partners in Parke Properties I, L.P., and Parke Properties II, L.P., hold a 70 percent interest. GDF Realty Investments, Ltd., holds the remaining interest in the property. It is located at the intersection of two major highways in what is, commercially and residentially, a rapidly growing area.

The property is part of the Jollyville Plateau and is characterized by karst topography, in which water percolating through limestone rock creates caves, sinkholes, and canyons. The property contains a number of caves, including Tooth, Kretschmarr, Root, Gallifer, and Amber, as well as a collection of caves known as the Cave Cluster.

Since acquiring the property, the Purcells and their partners (Purcells) have attempted to develop it commercially, including the installation of water and wastewater gravity lines, force mains, lift stations, and other utilities. These improvements have been dedicated to the City of Austin; a right-of-way, to Travis County.

In 1988, the United States Fish and Wildlife Service (FWS), an agency under the auspices of the Department of the Interior, issued a Rule listing five subterranean invertebrate species as endangered under § 4 of ESA, 16 U.S.C. § 1533(a)(1). 53 Fed. Reg. 36,029 (16 Sept. 1988). A sixth species was similarly listed in 1993. 58 Fed. Reg. 43,818 (18 Aug. 1993). These six species are found on the property; they are the Bee Creek Cave Harvestman, the Bone Creek Harvestman, the Tooth Cave Pseudoscorpion,

the Tooth Cave Spider, the Tooth Cave Ground Beetle and the Kretschmarr Cave Mold Beetle. The Rules were issued in order to protect the Cave Species from increasing dangers, primarily new development. 16 U.S.C. § 1531(a)(1); 53 Fed. Reg. 36,029.

The Bee Creek Cave Harvestman, the Bone Creek Harvestman, and the Tooth Cave Pseudoscorpion are subterranean, eyeless arachnids (arthropods bearing four pairs of legs and no antennae); they range in size from 1.4 to 4 mm. The Tooth Cave Spider, a subterranean arachnid with eyes, measures 1.6 mm in length. The Tooth Cave Ground Beetle and the Kretschmarr Cave Mold Beetle are subterranean insects, the latter being eyeless; they vary in size from 3 to 8 mm.

The Cave Species were listed as endangered for a number of reasons. First, as noted, they were primarily being threatened with "potential loss of habitat owing to ongoing development activities". 53 Fed. Reg. 36,031. Second, no state or federal laws were in place to protect them or their habitat. *Id.* at 36,031-32. Finally: "[The Cave Species] require the maximum possible protection provided by [ESA] because their extremely small, vulnerable, and limited habitats are within an area that can be expected to experience continued pressures from economic and population growth". *Id.* at 36,032.

Pursuant to § 9(a)(1) of ESA, 16 U.S.C. § 1538(a)(1)(B), it is unlawful to "take" a member of a species listed as endangered. ESA defines "take" as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect. . . . " 16 U.S.C. § 1532(19). Pursuant to authority given it by § 4(d) of ESA, 16 U.S.C. § 1533(d), FWS has defined "harm" to include significant modifications or degradations of a

habitat which kill or injure protected wildlife "by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering". 50 C.F.R. § 17.3.

The Cave Species are found only in underground portions of Travis and Williamson Counties, Texas. There is no commercial market for the Cave Species. At least 14 scientific articles concerning the Cave Species have been published in journals or other publications by 15 scientists. Some of them have visited Texas in order to study the Cave Species. For this research, members of the Cave Species have been transported to and from museums in New York, California, Pennsylvania, Illinois, and Kentucky.

In 1989, FWS notified the Purcells that their development plans might constitute a Cave Species take. In 1990, in an effort to alleviate FWS' concerns, the Purcells deeded approximately six acres of the property to Texas Systems of Natural Laboratories, Inc., a non-profit environmental organization. The gifted acres included various caves and sinkholes in which the Cave Species were known to live. The Purcells also constructed gates covering the most ecologically sensitive caves. These acts conformed to recommendations made by an expert on the Cave Species.

In 1991, the Purcells contracted to sell a portion of the property. Because FWS refused to state, however, that future development would not constitute a take, the agreement fell through. After clearing brush from the property in 1993, Dr. Purcell was advised by FWS that he was under federal criminal investigation for possible endangered species takes.

Subsequent to these incidents, the Parke's owners (including plaintiffs) filed in federal court for a declaratory judgment that development of the Parke would not constitute an endangered species take *Four Points Util. Joint Venture v. United States*, No. 93-CA-655 (W.D.Tex.1993). The district court ordered FWS to conduct an environmental review of the Parke.

In a 1994 letter summarizing that review, FWS notified the Parke's owners that the proposed development would likely constitute a take of the Cave Species, as well as of two bird species (golden-cheeked warbler and black-capped vireo). FWS' letter also noted that the Purcells' property within the Parke "could be developed without causing a take if development, among other things, [was] scaled back from the canyons, and surface and subsurface drainage and nutrient exchange [was] provided for".

The district court dismissed the action in September 1994. It ruled that FWS had to first determine whether a take had occurred; as FWS' letter indicated, it had not made that determination.

In 1997, the Purcells attempted to obtain ESA § 10(a) incidental take permits. *See* 16 U.S.C. § 1539(a). These permits allow takes of endangered species under certain circumstances, as listed in 16 U.S.C. § 1539(a)(2)(B).

The Purcells first sought the permit from the Balcones Canyonlands Conservation Plan, a regional body from which landowners obtain § 10(a) permits to develop protected land by paying "mitigation fees". It refused the application, however, because the relevant land was entirely within a protected area.

The Purcells next applied to FWS for the permit. *See* 16 U.S.C. 1539(a)(1). Their applications stated they planned to develop a shopping center (including a Wal-Mart), a residential subdivision, and office buildings (commercial development). FWS decided that the deeded preserves were inadequate to protect the Cave Species. As a result, the Purcells were unable to contract for the purchase and development of the property.

In July 1998, FWS advised the Purcells that the permits would be denied, but did not issue the denials. This effectively prevented the Purcells from challenging FWS' action.

Therefore, the Purcells filed suit in federal court, seeking a declaration that the permits had been denied *de facto. GDF Realty, Ltd. v. United States*, No. 98-CV-772 (W.D.Tex.1998). FWS then issued a formal statement, denying the permits based on its conclusion that, *inter alia,* Cave Species takes would occur if development were allowed. The district court ruled the permits had been denied. It also admonished FWS for delaying the denials when it had never intended to grant the permits.

In 1999, plaintiffs filed two actions in federal court. In the instant Commerce Clause action, they claim that, pursuant to *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), amplified post-filing of this action by *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), the ESA take provision, as applied to the Cave Species, is unconstitutional. (The second action, in the Court of Claims, No. 99-CV-513 (Fed.Cl.1999), claims an unconstitutional taking under the Fifth Amendment. It has been stayed pending this action.) In 2000, Parke Properties I, L.P., and GDF

Realty Investments, Ltd., filed for bankruptcy under Chapter 11. *In re Parke Properties I, L.P.*, No. 00-12587FM (Bankr.W.D.Tex.2000); *In re GDF Realty Investments, Ltd.*, No. 00-12588FM (Bankr.W.D.Tex.2000).

For this action, the parties agreed there are no factual disputes. Therefore, they filed cross-motions for summary judgment. In 2001, the district court granted summary judgment to defendants (FWS), holding the take provision constitutional under the Commerce Clause. *GDF Realty Investments, Ltd. v. Norton*, 169 F.Supp.2d 648 (W.D.Tex.2001). The district court analyzed the application of the take provision in the light of plaintiffs' proposed property development. Being "hard-pressed to find a more direct link to interstate commerce than a Wal-Mart [(as noted, one was to be located on the property)]", *id.* at 662, the court held the take provision's incorporation of the Cave Species, as applied to plaintiffs, was substantially related to interstate commerce, *id.* at 664.

II.

A summary judgment, reviewed *de novo*, *e.g.*, *Horton v. City of Houston*, 179 F.3d 188, 191 (5th Cir.), *cert. denied*, 528 U.S. 1021, 120 S.Ct. 530, 145 L.Ed.2d 411 (1999), is proper if "there is no genuine issue as to any material fact and . . . the [movant] is entitled to a judgment as a matter of law". Fed.R.Civ.P. 56(c). *E.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Because there are no material fact issues, the only question is the constitutionality vel non of the take provision as applied to the Cave Species and pursuant to the power granted Congress under the Commerce Clause. U.S. Const. art. I, § 8, cl. 3.

"In reviewing an act of Congress passed under its Commerce Clause authority, we apply the rational basis test as interpreted by the *Lopez* court." *Groome Resources, Ltd. v. Parish of Jefferson,* 234 F.3d 192, 203 (5th Cir.2000). In other words: "Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a *plain showing* that Congress has exceeded its constitutional bounds". *Morrison*, 529 U.S. at 607, 120 S.Ct. 1740 (emphasis added).

Recently, our court extensively discussed the history of the Commerce Clause and the earlier noted landmark *Lopez* and *Morrison* decisions relied upon by plaintiffs. *United States v. Ho*, 311 F.3d 589 (5th Cir.2002). We need only briefly revisit that discussion.

Ho concerned using less expensive procedures for removal and disposal of asbestos than necessary to comply with, *inter alia,* 42 U.S.C. §§ 7412(h) and 7414(a) of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and implementing regulations, 40 C.F.R. § 61.145. Ho claimed these statutes and regulations, as applied to him, violated the Commerce Clause. Our court held the sections of the Clean Air Act were constitutional exercises of Congress' power to regulate interstate commerce. *Ho*, 311 F.3d at 603-04. In doing so, our court described "first principles" of commerce clause jurisprudence. *Id.* at 596-601. No authority need be cited for the fundamental and well-known limitation on the power of our Federal Government: the Constitution grants it limited and enumerated powers; those powers not so granted the Federal Government are retained by the States.

This division of powers was thought necessary "to ensure protection of our fundamental liberties". *Id.* at 596 (quoting *Lopez,* 514 U.S. at 552, 115 S.Ct. 1624 (internal citation omitted)). Justice Kennedy summarized this point in his *Lopez* concurrence:

> Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."

514 U.S. at 576, 115 S.Ct. 1624 (Kennedy, J., concurring) (quoting THE FEDERALIST NO. 51, at 323 (James Madison) (C. Rossiter ed., 1961)). In keeping with the subject at hand, the strength of this governmental system is aptly described by Kipling: "For the strength of the pack is the wolf and the strength of the wolf is the pack". RUDYARD KIPLING, THE SECOND JUNGLE BOOK, The Law of the Jungle 189 (Penguin Books 1987) (1895).

As noted, one of the Federal Government's enumerated powers is "to regulate Commerce . . . among the several States . . . " (interstate commerce). U.S. Const. art. I, § 8, cl. 3. Since *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937), "Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause" than it had previously been afforded. *Morrison,* 529 U.S. at 608,

120 S.Ct. 1740. On the other hand, *our constitutional* structure mandates a distinction between "what is truly national and what is truly local". *Id.* at 617-18, 120 S.Ct. 1740; *Lopez,* 514 U.S. at 567-68, 115 S.Ct. 1624.

The Court's fairly recent decisions in *Morrison* and *Lopez* have defined the outer limits of Commerce Clause power. *Lopez* described three categories of activity which Congress may regulate under it: "the use of the channels of interstate commerce"; "the instrumentalities of interstate commerce"; and "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce". 514 U.S. at 558-59, 115 S.Ct. 1624. As the parties note, at issue is the third category – "those activities that substantially affect interstate commerce".

The Cave Species exist only in Texas. Therefore, at issue are ESA takes concerning *intrastate,* not interstate, activity. Pursuant to *Lopez, Morrison* identified four considerations for use in deciding whether intrastate activity substantially affects interstate commerce. 529 U.S. at 609, 120 S.Ct. 1740.

The first consideration is the economic nature *vel non* of the intrastate activity. *Id.* at 610-11, 120 S.Ct. 1740. Along this line, *Morrison* cited *Lopez*'s cautionary language:

> Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution,

> and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause will always engender "legal uncertainty".

Id. at 610, 120 S.Ct. 1740 (quoting *Lopez*, 514 U.S. at 566, 115 S.Ct. 1624).

The second consideration is the presence *vel non* of a jurisdictional element in the statute, which limits its application to instances affecting interstate commerce. *Id.* at 611-12, 120 S.Ct. 1740.

The third consideration is any Congressional findings in the statute or its legislative history concerning the effect the regulated activity has on interstate commerce. *Id.* at 612, 120 S.Ct. 1740.

The final consideration is the attenuation of the link between the intrastate activity and its effect *vel non* on interstate commerce. *Id.*

As described in *Ho*, there are two ways in which intrastate activity might substantially affect interstate commerce. 311 F.3d at 598-99. FWS urges that Cave Species takes have this effect under each method.

First, the activity alone might have such an effect. *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937). Second, in some circumstances, the activity's effects may be aggregated with those of other similar activities, the sum of which might be substantial in relation to interstate commerce. *Morrison*, 529 U.S. at 613, 120 S.Ct. 1740 (striking down civil remedy provision of Violence Against Women Act, 42 U.S.C. § 13981, while not adopting "a categorical rule

against aggregating the effects of any noneconomic activity"). *See also, e.g., Lopez,* 514 U.S. at 559-61, 115 S.Ct. 1624; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981); *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964); *Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942).

> Whether and how Congress may apply the aggregation principle are controversial questions. The pitfalls are apparent. For example, any imaginable activity of mankind can affect the alertness, energy, and mood of human beings, which in turn can affect their productivity in the workplace, which when aggregated together could reduce national economic productivity. Such reasoning would eliminate any judicially enforceable limit on the Commerce Clause, *thereby turning that clause into what it most certainly is not, a general police power.*

Ho, 311 F.3d at 599 (emphasis added).

In other words, and as the Supreme Court has made quite clear, the aggregation principle has limits. For example, *Lopez* held that gun possession near schools could not be regulated under the Commerce Clause power. The statute at issue proscribed knowing possession of "a firearm at a place that [an individual] knows . . . is a school zone". 18 U.S.C. § 922(q)(1)(A) (1988). The Court held the statute had "nothing to do with 'commerce' or any sort of economic enterprise". 514 U.S. at 561, 115 S.Ct. 1624.

It bears reminding that at issue is the power to regulate interstate *commerce.* In that sense, commerce is "[t]he exchange of goods and services" or "[t]rade and other

business activities". BLACK'S LAW DICTIONARY 263 (7th Ed. 1999). Commerce is traffic, "but it is something more: it is intercourse". *Lopez*, 514 U.S. at 553, 115 S.Ct. 1624 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90, 6 L.Ed. 23 (1824)). In *Wickard*, for example, the intrastate activity (wheat produced solely for producer's personal use) was held "commercial" because it affected market conditions. 317 U.S. at 128, 63 S.Ct. 82. In this regard, *Groome* noted the "broad reading [to be given] commercial and economic activities under the Commerce Clause". 234 F.3d at 208-09.

As mentioned, *Morrison* noted, for aggregation purposes, the importance of the economic nature of the regulated activity: "While we need not adopt a categorical rule against aggregating the effects of *noneconomic* activity in order to decide these cases, thus far . . . our cases have upheld Commerce Clause regulation of intrastate activity *only* where that *activity is economic in nature*". 529 U.S. at 613, 120 S.Ct. 1740 (emphasis added).

Lopez did, however, approve the standard provided in *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968) (holding constitutional the 1961 and 1966 extensions of the Fair Labor Standards Act, 29 U.S.C. §§ 203, 206, and 207). *Lopez* stated: "[W]here *a general regulatory scheme bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence". 514 U.S. at 558, 115 S.Ct. 1624 (emphasis in original; internal citation omitted). The *de minimis* instance, however, must be "*an essential part of a larger regulation of economic activity*, in which the regulatory scheme *could* be undercut unless the intrastate activity were regulated". *Id.* at 561,

115 S.Ct. 1624 (emphasis added). *See also Hodel v. Indiana*, 452 U.S. 314, 329 n. 17, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981); *United States v. Ballinger,* 312 F.3d 1264, 1270 (11th Cir.2002); *Freier v. Westinghouse Electric Corp.*, 303 F.3d 176, 201-03 (2nd Cir.2002), *petition for cert. filed* (U.S. Jan. 6, 2003) (No. 02-1036); *United States v. Cortes*, 299 F.3d 1030, 1035 (9th Cir.2002).

Ho held such a regulatory scheme existed with regard to asbestos removal:

> First, the regulated intrastate activity, asbestos removal, is very much a commercial activity in today's economy. It is a booming industry, given the hazardous nature of asbestos and its seeming ubiquity in older buildings. There is nothing inherently criminal or disfavored about asbestos removal; in fact, it might be considered a public service, and many reputable and certified businesses exist solely to remove asbestos from contaminated buildings.
>
> Both the state and federal governments license businesses and individuals in the field. Most, if not all, asbestos removal projects have a commercial purpose, because handling toxic carcinogens is not something many people enjoy for its own sake. Unless the owner of an asbestos-containing building needs to renovate the building or demolish it for use of the land on which it sits, he is very likely to let sleeping dogs lie and not incur the costs or dangers of asbestos removal.

311 F.3d at 602. Moreover, by using methods less expensive than those required to comply with the regulatory scheme, Ho was able to gain a commercial advantage over his competitors, thereby substantially affecting, or undercutting, the economic regulatory scheme. *Id.* at 603. In

addition to the economic nature of the activity, *Ho* examined the other three *Morrison* considerations in holding aggregation proper. 311 F.3d at 602-04.

In the light of *Lopez* and *Morrison,* the key question for purposes of aggregation is whether the nature of the regulated activity is economic. As noted, *Morrison* and *Lopez* recognize this question is likely to generate "legal uncertainty". *Morrison,* 529 U.S. at 610, 120 S.Ct. 1740; *Lopez*, 514 U.S. at 566, 115 S.Ct. 1624. One way in which the regulated activity might be economic is when, as discussed earlier, the intrastate activity is part of an economic regulatory scheme which could be undercut but for the particular intrastate regulation. *Lopez*, 514 U.S. at 561, 115 S.Ct. 1624.

Post-*Lopez,* our court has faced these questions. A pre-*Morrison* decision, *United States v. Bird*, 124 F.3d 667 (5th Cir.1997), *amended by* 1997 U.S.App. LEXIS 33988, *cert. denied,* 523 U.S. 1006, 118 S.Ct. 1189, 140 L.Ed.2d 320 (1998), affirmed a conviction under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248. *Bird* held that noncommercial, intrastate activity (threats and intimidation directed at provider of abortion services) may be aggregated to find a substantial effect on interstate commerce. *Id.* at 676-82. For that holding, the determining factor was that "there is a national commercial market in abortion-related services such that the regulated conduct – considered in light of the size and scope of the benchmark market – substantially affects interstate commerce". *Id.* at 677. *See id.* at 681-82.

Noting *Bird* was decided pre-*Morrison, Ho* seems to leave open the question whether aggregation can be extended to non-economic activity. 311 F.3d at 600, n. 10.

Further, in *United States v. Hickman,* 179 F.3d 230 (5th Cir.1999) (pre-*Morrison*), *cert. denied,* 530 U.S. 1203, 120 S.Ct. 2195, 147 L.Ed.2d 232 (2000), and *United States v. McFarland,* 311 F.3d 376 (5th Cir.2002) (post-*Morrison*), *petition for cert. filed,* (U.S. Jan. 7, 2003) (No. 02-8338), our evenly divided en banc court addressed aggregating individual, intrastate robberies to find a substantial effect on interstate commerce under the Hobbs Act, 18 U.S.C. § 1951 (criminalizing efforts to "obstruct[], delay[], or affect[] commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . ").

The dissent in *Hickman,* adopted by half of our en banc court, stated:

> [I]ndividual acts cannot be aggregated if their effects on commerce are causally independent of one another. That is, if the effect on interstate commerce directly attributable to one instance of an activity does not depend in substantial part on how many other instances of the activity occur, there is an insufficient connection – in other words, an interactive effect – and the effect of different instances cannot be added. If, on the other hand, the occurrence of one instance of the activity makes it substantially more or less likely that other instances will occur, then there is an interactive effect and the effects of different instances can be added.

179 F.3d at 233 (Higginbotham, J., dissenting).

This "interactive effect" requirement flows from the requirement in *Lopez* that failure to regulate the intrastate activity could "undercut" the entire scheme. Along this line, *Ho* held that the instance of intrastate asbestos

removal had an effect on the larger economic regulation of the asbestos industry. 311 F.3d at 602.

In addressing the Hobbs Act issue faced in *Hickman*, one dissent in *McFarland*, again adopted by half of our en banc court, stated:

> Assuming, *arguendo*, that there is a class of [*Lopez*] category three cases [substantial effect] as to which there are no restraints whatever on aggregation, we conclude that such a class would *exclude* instances where "the regulated activity" is *not* properly described as "commercial" or "economic" *in the same general sense* as "commercial."

311 F.3d at 396 (Garwood, J., dissenting) (emphasis in original). In the intervening light of *Morrison*, that dissent agreed with the *Hickman* dissent.

> Where the Supreme Court has applied aggregation to uphold federal regulation of intrastate conduct against constitutional challenge under the Commerce Clause, there has always been a *rational basis* to find sufficient interrelationship or commonality of effect on interstate commerce among the discrete intrastate instances regulated and between them and a scheme of regulation (protection, enhancement or restriction) of some particular interstate market or activity such that the regulation of those intrastate activities can rationally be viewed as necessary to the effectiveness of or a meaningfully supporting part of the scheme of regulation of that particular interstate activity or market.

Id. at 401 (emphasis added).

Plaintiffs maintain that Cave Species takes have no relationship, let alone a substantial one, to interstate commerce. They concede, however, that all takes of endangered species, if aggregated, would have the requisite substantial effect; but, they maintain, aggregation is not proper because Cave Species takes are non-economic in nature and not an essential part of a regulatory scheme.

ESA was enacted in 1973 in response to threats to fish, wildlife, and plants (wildlife). 16 U.S.C. § 1531(a)(1). These threats arose principally from "pollution, destruction of habitat and the *pressures of trade*". H.R. Rep. No. 93-412, at 2 (1973) (emphasis added). Congress noted that "the pace of disappearance of species is accelerating". *Id.* at 4. This acceleration was troubling because, *inter alia,* "it is in the best interest of mankind to minimize the losses of genetic variations". *Id.* at 5. That interest, Congress said, was "simple: [the genetic variations] are potential resources". *Id.*

> They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.
>
> To take a homely, but apt, example: one of the critical chemicals in the regulation of ovulation in humans was found in a common plant. Once discovered and analyzed, humans could duplicate it synthetically, but had it never existed – or had it been driven out of existence before we knew its potentialities – we would never have tried to synthesize it in the first place.
>
> Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed?

> More to the point, who is prepared to risk . . . those potential cures by eliminating those plants for all time? Sheer self-interest impels us to be cautious.

Id.

Tennessee Valley Authority v. Hill, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) (*TVA*), the famous snail darter decision, reviewed ESA's legislative history in the process of upholding an injunction pursuant to the Secretary of the Interior's determination that the operation of a federal dam would eradicate an endangered species. At issue was 16 U.S.C. § 1536, which requires federal agencies to consult with the Secretary regarding projects and to "utilize their authorities in furtherance of the purposes of [ESA]. . . . " The Court recognized Congress' "newly declared national policy of preserving endangered species", *id.* at 176, 98 S.Ct. 2279, and held: "The plain intent of Congress in enacting [ESA] was to halt and reverse the trend toward species extinction, *whatever the cost*", *id.* at 184, 98 S.Ct. 2279 (emphasis added).

Of course, notwithstanding this "plain intent", ESA's take provision as applied in this case must have firm footing in the Commerce Clause. In this regard, ESA's take provision has no jurisdictional requirement that might otherwise limit its application to species bearing some relationship to interstate commerce. Nor does the take provision list the species to be protected. Instead, ESA incorporates listings, promulgated from time to time by FWS, that determine which species are covered by the take provision. 16 U.S.C. § 1533(c).

A.

Aggregation or no, the first of the four *Morrison* considerations concerns the economic nature *vel non* of the *regulated activity*. On this key point, at issue is what constitutes the "regulated activity". Plaintiffs assert that, for evaluating substantial effect, we should look only to the expressly regulated activity – Cave Species takes. FWS responds that, in addition, we should consider such regulation in the light of plaintiffs' planned commercial development and, by extension, its effect on interstate commerce.

The district court agreed with FWS and looked *primarily* to plaintiffs' planned development:

> [T]he regulated activity in this case is plaintiffs' alleged take of the Cave Species by their planned development of the Property. This development includes plans to build "a shopping center, a residential subdivision, and office buildings" on the Property. . . . This activity, standing alone, "would easily be classified as substantially affecting interstate commerce."

169 F.Supp.2d at 658 (internal citations omitted).

The district court characterized plaintiffs' challenge as being "as-applied". Whether it is "as-applied" or "facial", the district court correctly concluded it should evaluate plaintiffs' conduct in determining whether the take provision, as applied to the Cave Species, was unconstitutional. *See City of Chicago v. Morales*, 527 U.S. 41, 78 n. 1, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (Scalia, J., dissenting) (aside from First Amendment "overbreadth" cases, "a facial attack, since it requires unconstitutionality in all circumstances, necessarily presumes that the litigant

presently before the court would be able to sustain an as-applied challenge"); *see also United States v. Salerno,* 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The above-quoted passage from the district court opinion reflects, however, that the court extended the scope of this relevant conduct beyond plaintiffs' Cave Species takes; it *primarily* considered plaintiffs' commercial motivations that would underlie the takes. As discussed below, and consistent with the Supreme Court's interpretation of the Commerce Clause, we conclude that the scope of inquiry is primarily whether the *expressly regulated activity* substantially affects interstate commerce, *i.e.,* whether takes, be they of the Cave Species or of all endangered species in the aggregate, have the substantial effect.

In this regard, neither this court, nor the Supreme Court, has explicitly determined the scope of the substantial effects analysis. Nonetheless, the Supreme Court has expressed concerns about this issue. In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs,* 531 U.S. 159, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001), under § 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), the Corps of Engineers claimed jurisdiction over abandoned sand and gravel pits which had become seasonal ponds and, concomitantly, habitats for migratory birds. As a result, the Corps prevented construction of a landfill on a site. The landfill developers contended that, through such regulation, the Corps overstepped its statutorily-prescribed jurisdictional bounds, and, alternatively, Congress exceeded its Commerce Clause power.

Resolving the case by interpreting the Clean Water Act, the Court avoided the constitutional issue. Nevertheless, it shed light on the scope-issue at hand:

> [The Government] . . . note[s] that the protection of migratory birds is a national interest of very nearly the first magnitude, and that, as the Court of Appeals found, millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds. These arguments raise significant constitutional questions. For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner's land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam, focus upon the fact that the regulated activity is petitioner's municipal landfill, which is plainly of commercial nature. But this is a far cry, indeed, from the "navigable waters" and "waters of the United States" to which the statute by its terms extends.*

Id. at 173, 121 S.Ct. 675 (emphasis added; internal citation and quotation omitted).

Again, we must resolve the question of which activities are to be primarily considered in order to determine substantial effect *vel non.* Each of the three *Lopez* categories recognizes Congress' power to regulate where the *object of regulation* relates to interstate commerce: channels, instrumentalities, or activities. Neither the plain language of the Commerce Clause, nor judicial decisions construing it, suggest that, concerning substantial effect *vel non,* Congress may regulate activity (here, Cave Species takes) solely because non-regulated conduct (here, commercial development) by the actor engaged in the regulated activity will have some connection to interstate commerce.

In expanding its scope-inquiry to plaintiffs' commercial motivations, the district court relied on *Groome,* which evaluated Congress' Commerce Clause power to regulate under the Fair Housing Act, 42 U.S.C. § 3604(f)(3)(B). *Groome* stated that, in *Lopez* and *Morrison,* "neither the 'actors' nor the 'conduct' *of the regulation* had a commercial character". 234 F.3d at 204 (emphasis added). *Groome* recognized that, in analyzing the effect on interstate commerce, courts look only to the expressly regulated activity. In *Groome*, that was the sale and rental of housing. The actor's conduct was commercial in nature, but that characteristic was only relevant insofar as it fell within the regulated activity. *Id.* at 205-16.

Unlike *Groome,* the district court in this case looked primarily beyond the regulated conduct – Cave Species takes – in order to assess effect on interstate commerce. It looked to plaintiffs' planned commercial development of the property where the takes would occur. True, the *effect* of regulation of ESA takes may be to prohibit such development in some circumstances. But, Congress, through ESA, is not directly regulating commercial development.

To accept the district court's analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not to non-commercial actors. There would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce.

Along this line, looking primarily beyond the regulated activity in such a manner would "effectually obliterate" the limiting purpose of the Commerce Clause. *Jones & Laughlin Steel Corp.,* 301 U.S. at 37, 57 S.Ct. 615.

Concomitantly, the facial challenges in *Lopez* and *Morrison* would have failed. For instance, regulation of gun possession near schools, at issue in *Lopez,* would arguably pass constitutional muster as applied to a possessor who was a significant gun salesman. Therefore, § 922(q)(1)(A) could not have been facially unconstitutional. *See Salerno,* 481 U.S. at 745, 107 S.Ct. 2095. Similarly, the Violence Against Women Act, at issue in *Morrison,* would arguably have been a constitutional exercise of Congressional power if it were used to prosecute a person who committed violence against women and then sold a substantial number of videotapes of the encounter in interstate markets. It too would have withstood a facial attack. Such results, of course, run contrary to *Lopez* and *Morrison.*

Ho ruled that "the regulated intrastate activity, asbestos removal, is very much a commercial activity in today's economy. . . . Both the state and federal governments license businesses and individuals in the field. Most, if not all, asbestos projects have a commercial purpose. . . . " 311 F.3d at 602. Thus *Ho* primarily analyzed the expressly regulated activity. Only after doing so did *Ho* note: "Moreover, [plaintiff's] activities were driven by commercial considerations". *Id.*

Two circuits have published opinions upholding ESA's constitutionality; they looked, at times, to the nature of the actor's general conduct. *National Association of Home Builders v. Babbitt,* 130 F.3d 1041 (D.C.Cir.1997), *cert. denied,* 524 U.S. 937, 118 S.Ct. 2340, 141 L.Ed.2d 712 (1998) (*NAHB*) (pre-*Morrison*); *Gibbs v. Babbitt,* 214 F.3d 483 (4th Cir.2000), *cert. denied, Gibbs v. Norton,* 531 U.S. 1145, 121 S.Ct. 1081, 148 L.Ed.2d 957 (2001). (In addition, the Ninth Circuit, in upholding the constitutionality of the Eagle Protection Act, 16 U.S.C. 668, approvingly cited a

district court decision, *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F.Supp. 985 (D.Haw.1979), *aff'd*, 639 F.2d 495 (9th Cir.1981), concerning ESA's effect on interstate commerce. *United States v. Bramble*, 103 F.3d 1475, 1481 (9th Cir.1996).)

In *NAHB* and *Gibbs*, however, the actor's general conduct was not the sole basis for finding economic activity or a substantial effect on interstate commerce. To this extent, *NAHB* and *Gibbs* are consistent with the analysis in *Ho*.

NAHB, decided pre-*Morrison*, considered whether Congress had the power to regulate takes of the Delhi Sands Flower-Loving Fly, a species found only in California. The takes were caused by a planned hospital renovation. For a divided panel, two members held ESA constitutional, each on different grounds; one member opined it was unconstitutional.

In the main opinion, Judge Wald upheld ESA on two bases: as a valid regulation of the channels of interstate commerce; and because the takes substantially affected interstate commerce. For the substantial effect analysis, she did not look beyond the expressly-regulated activity. She did so, however, for the "channels of interstate commerce" analysis. 130 F.3d at 1048. There is, of course, good reason to look beyond the regulated activity to determine whether such channels are being used; whether an actor deals in these channels is directly relevant.

In her *NAHB* concurrence, Judge Henderson concluded the takes affected biodiversity, which in turn substantially affected interstate commerce. She briefly noted, however, that the regulation plainly affected interstate commerce because "[it] relates to both the proposed

redesigned traffic intersection and the hospital it is intended to serve. . . . " *NAHB,* 130 F.3d at 1059 (Henderson, J., concurring).

Of course, the ESA regulation at issue in *NAHB* did not relate to traffic intersections; it related to fly takes. Judge Henderson relied, in part, on the following language from *Heart of Atlanta Motel* to support her conclusion: "The facilities and instrumentalities used to carry on this commerce such as railroads, truck lines, ships, rivers, *and even highways* are also subject to congressional regulation, so far as is necessary to keep interstate traffic upon fair and equal terms." 379 U.S. at 271, 85 S.Ct. 348 (emphasis added). This statement provides an example of Congress' power to regulate the use of the channels of interstate commerce, rather than those activities having a substantial effect on interstate commerce.

While the take provision may have prevented the hospital renovations in *NAHB* or the commercial developments in the case at hand, ESA does not *directly* regulate these activities. The *NAHB* dissent noted:

> An alternative reading of Judge Henderson's second justification with its stress on the effect of the regulation upon the highway and hospital is that she concludes that Congress may regulate purely intrastate activities – *e.g.,* the habitat modification of the fly – where the *regulation* will then affect items which are arguably in interstate commerce. Again, I do not see the stopping point. Congress is not empowered either by the words of the Commerce Clause or by its interpretation in *Lopez* to regulate any non-commercial activity where the regulation will substantially affect interstate commerce. . . . Nowhere is it suggested that Congress can regulate activities

> not having a substantial effect on commerce *because the regulation itself can be crafted in such a fashion as to have such an effect.*

Id. at 1067 (Sentelle, J., dissenting) (emphasis added). As noted, however, Judge Henderson did not rely *primarily* on the commercial development, but instead analyzed the expressly regulated activity – the takes' effect on biodiversity.

Gibbs held Congress did not exceed its Commerce Clause power by regulating red wolf takes. 214 F.3d at 487. The wolves had been reintroduced on federal land, but had roamed onto private land in North Carolina and Tennessee. In holding the wolves had a substantial effect on interstate commerce, a divided panel noted that the take provision limited the ability to protect livestock and other agricultural products from the wolves: "The regulation here targets takings that are *economically motivated* – farmers take wolves to protect valuable livestock and crops." *Id.* at 495 (emphasis added). As discussed *infra*, *Gibbs* held primarily, however, that the expressly regulated activity – red wolf takes, regardless of farmers' motivations – was economic in nature.

In the light of the successful *facial* challenges in *Lopez* and *Morrison* and the emphasis our court and sister circuits have placed on the economic nature *vel non* of the expressly regulated activity, the district court erred in looking primarily to plaintiffs' commercial motivations.

B.

As discussed earlier, there are two ways in which intrastate activity can substantially affect interstate commerce: the activity can be of a nature and scope that it,

alone, has such an effect; and, in certain circumstances, the activity can be aggregated with similar activities, so that the sum of the activities has the requisite substantial effect. As also discussed, FWS contends regulation of Cave Species takes is proper under either method. For either, the goal remains the same: distinguishing between "what is truly national and what is truly local". *Morrison*, 529 U.S. at 617-18, 120 S.Ct. 1740; *Lopez*, 514 U.S. at 567-68, 115 S.Ct. 1624; *Ho*, 311 F.3d at 601.

1.

In urging Cave Species takes, alone, have a "direct relationship" with, and substantial effect on, interstate commerce, FWS claims two significant effects: the "substantial" scientific interest generated by the Cave Species; and their *possible* future commercial benefits.

a.

Concerning the scientific interest effect, some scientists have studied the Cave Species. In doing so, some of them have traveled to Texas. In coordination with this research, some Cave Species have been transported to and from museums in five States. Finally, articles about the Cave Species have been published in scientific journals.

According to FWS, this demonstrates the Cave Species "play a role in interstate commerce". Obviously, even assuming this is true, this does not necessarily constitute the substantial effect mandated by *Lopez* and *Morrison*. To the extent FWS contends that the loss of the Cave Species would affect the scientific travel or publication industries, it offers no evidence that it would substantially do so. In

fact, the minimal evidence presented by FWS indicates such an effect would be negligible.

In upholding the red wolf take provision, *Gibbs* held the takes "implicate[d] a variety of commercial activities and [was] closely connected to several interstate markets". 214 F.3d at 492. Chief among them were red-wolf-related tourism, "scientific research", and the "commercial trade" in pelts. *Id.* at 493-95. *Gibbs* held the "takings of red wolves in the aggregate have a sufficient impact on interstate commerce". *Id.* at 493. (As discussed, *Gibbs* also observed that the takes were motivated by commercial incentives.)

Obviously, the commercial impact of red wolves is significantly greater than that of the Cave Species. *See id.* at 493-94 ("According to a study . . . the recovery of the red wolf and increased visitor activities could result in a significant regional economic impact. [The study's author] estimates that northeastern North Carolina could see an increase of between $39.61 and $183.65 million per year in tourism-related activities" (internal citation omitted).).

In the case of the Cave Species, any connection between takes and impact on the scientific travel or publication industries is, as noted, negligible. Under *Morrison*'s fourth consideration, any claim that the connection rises to a "substantial relationship" is far too attenuated to pass muster.

b.

Alternatively, FWS claims future commercial benefits derived from the Cave Species will be significant enough to substantially affect interstate commerce. Research

concerning certain endangered species has been used in the treatment of disease. *See, e.g.*, Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 270-71 (1991) (study of endangered pupfish in relation to kidney disease); Keith Rizzardi, *Toothless? The Endangered Manatee and the Florida Manatee Sanctuary Act*, 24 FLA. ST. U.L. Rev. 377, 380 (1997) (study of endangered manatees in relation to hemophilia).

FWS posits here:

> The value of the cave species . . . *may* be even more significant than those of the pupfish and the manatee, given the unique features of cave species. *Although little is yet understood about these particular species,* scientists have long observed that cave species, because of their peculiar habitats, often exhibit incredibly low metabolic rates and possess extremely long lifespans . . . compared to other invertebrates. Such characteristics suggest that further study of these species *could* lead to important developments in our understanding of longevity. . . .

(Emphasis added; internal citations and quotations omitted). In short, this claim is not supported by evidence concerning Cave Species. It is conjecture.

This contention, whatever its merits may ultimately be, runs afoul of the attenuation consideration. The *possibility* of future substantial effects of the Cave Species on interstate commerce, through industries such as medicine, is simply too hypothetical and attenuated from the regulation in question to pass constitutional muster. *See Morrison*, 529 U.S. at 612, 120 S.Ct. 1740.

2.

In the alternative, FWS contends that Cave Species takes may be aggregated with those of all other endangered species. As noted, plaintiffs concede this aggregation would have the requisite substantial effect on interstate commerce. *See NAHB,* 130 F.3d at 1053-54 ("In the aggregate, however, we can be certain that the extinction of the species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce.").

At issue is what circumstances must be present in order to justify aggregation when, as in this case, intrastate activity has a *de minimis* effect on interstate commerce. As noted, *Lopez* and *Morrison* instruct courts to consider, *inter alia*, the activity's economic or commercial nature. And, as discussed *supra,* one key way by which intrastate activity may be considered "economic" or "commercial" is through its importance to an economic regulatory scheme.

As noted earlier, whether an activity is economic or commercial is to be given a broad reading in this context. *Groome*, 234 F.3d at 208-09. Nevertheless, in a sense, Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture. If the speculative future medicinal benefits from the Cave Species makes their regulation commercial, then almost anything would be. Moreover, unlike the red wolves (and their pelts) in *Gibbs*, there is no historic trade in the Cave Species, nor do tourists come to Texas to view them.

FWS posits that, because, in the aggregate with other endangered species, Cave Species takes will have a substantial effect on interstate commerce, these takes can be classified as commercial. To accept such a justification

would render meaningless any "economic nature" prerequisite to aggregation. An activity cannot be aggregated based solely on the fact that, post-aggregation, the sum of the activities will have a substantial effect on commerce. This would vitiate *Lopez* and *Morrison*'s seeming requirement that the intrastate instance of activity be commercial. Noneconomic and noncommercial activity could be aggregated so long as, if aggregated, it would have a substantial effect. *Lopez* and *Morrison* stand against such a proposition.

On the other hand, the regulation of the Cave Species is part of a larger regulation of activity. The take provision as applied to the Cave Species is part of the take provision generally and ESA as a whole. More is required, however. As discussed earlier, non-commercial, intrastate activities must be "essential" to an *economic* regulatory scheme's efficacy in order, under this rationale, for aggregation to be appropriate.

First, the larger regulation must be directed at activity that is economic in nature. *Lopez*, 514 U.S. at 561, 115 S.Ct. 1624. *See also Morrison,* 529 U.S. at 610, 120 S.Ct. 1740. ESA states that endangered species are of "esthetic, ecological, educational, historical, recreational, and scientific value. . . . " 16 U.S.C. § 1531(a)(3). Along this line, courts may also look to ESA's legislative history. *Morrison,* 529 U.S. at 612, 120 S.Ct. 1740. In this light, ESA's protection of endangered species is economic in nature. As noted, ESA's drafters were concerned by the "incalculable" value of the genetic heritage that might be lost absent regulation. *See* H.R. Rep. No. 93-412, at 4. With regard to a precursor to ESA, the Senate Report observed:

> From a pragmatic point of view, the protection of an endangered species of wildlife with some commercial value may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed. In such a case businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels in a very brief span of time. *Potentially more important,* however, is the fact that with each species we eliminate, we reduce the [genetic] pool . . . available for use by man in future years. Since each living species and subspecies has developed in a unique way to adapt itself to the difficulty of living in the world's environment, as a species is lost, its distinctive gene material, which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminant, is also irretrievably lost.

S. Rep. No. 91-526, at 1415 (1969) (emphasis added).

Aside from the economic effects of species loss, it is obvious that the majority of takes would result from economic activity. *See, e.g.,* 16 U.S.C. § 1531(a)(1) ("various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation"); 16 U.S.C. § 1533(f) (recovery plans should give priority to species that are in "conflict with construction or other development projects or other forms of economic activity . . . "). Indeed, Congress' findings are reflected in the case at hand: the Cave Species takes would occur as a result of plaintiffs' planned commercial development.

Moreover, ESA is "truly national" in scope. *See Morrison,* 529 U.S. at 617-18, 120 S.Ct. 1740; *Lopez*, 514 U.S. at 567-68, 115 S.Ct. 1624. This is the case, despite the concerns raised by amicus State of Texas. It is true that land use and wildlife preservation are traditional areas of state concern. Nevertheless, "this authority is shared with the Federal Government when [it] exercises one of its enumerated constitutional powers". *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999).

Second, in order to aggregate, the regulated intrastate activity must also be an "essential" part of the economic regulatory scheme. Judge Wald's opinion in *NAHB* held ESA's take provision constitutional as applied to an intrastate species of insect. Key to this conclusion, and challenged by the other two panel members, was the determination that individual takes of the species could be aggregated. The opinion assumed aggregation, holding that, because "biodiversity has a . . . substantial . . . effect on . . . interstate commerce, 'the *de minimis* character of individual instances arising under [ESA] is of no consequence'". 130 F.3d at 1053, n. 14 (quoting *Lopez,* 514 U.S. at 558, 115 S.Ct. 1624).

The opinion did not discuss, however, *Lopez*' earlier requirement that *de minimis* instances of activity subsumed within a regulatory scheme must be essential to that scheme, so that it could be *undercut* without the particular regulation. 514 U.S. at 561, 115 S.Ct. 1624. Along this line, the *NAHB* dissent noted: "There is no showing, but only the rankest of speculation, that a reduction or even complete destruction of the viability of the [species] will in fact affect land and objects that are

involved in interstate commerce". 130 F.3d at 1065 (Sentelle, J., dissenting) (internal citations and quotations omitted).

In *TVA*, however, the Court recognized that "Congress was concerned [not only] about the *unknown* uses that endangered species might have[, but also] about the *unforeseeable* place such creatures may have in the chain of life on this planet". 437 U.S. at 178-79, 98 S.Ct. 2279 (emphasis in original). Citing that portion of *TVA*, *Gibbs* reaffirmed Congress' power to "manage the interdependence of endangered animals and plants in large ecosystems". 214 F.3d at 496. *See also NAHB,* 130 F.3d at 1052 n. 11; *id.* at 1058 (Henderson, J., concurring) ("The effect of a species' continued existence on the health of other species within the ecosystem seems to be generally recognized among scientists.").

FWS contends: "Allowing a particular take to escape regulation because, viewed alone, it does not substantially affect interstate commerce, would undercut the ESA scheme and lead to piece-meal extinctions". Along this line, it maintains that takes of any species threaten the "interdependent web" of all species. Congress described this "critical nature of the interrelationships of plants and animals between themselves and with their environment". H.R. Rep. No. 93-412, at 6. In fact, according to Congress, the "essential purpose" of ESA is "to protect the ecosystems upon which we and other species depend". *Id.* at 10.

ESA's take provision is economic in nature and supported by Congressional findings to that effect. Although, as noted, there is no express jurisdictional element in ESA, our analysis of the interdependence of species compels the conclusion that regulated takes under ESA do

affect interstate commerce. In this sense, ESA's take provision *is limited* to instances which "have an explicit connection with or effect on interstate commerce". *Morrison*, 529 U.S. at 611-12, 120 S.Ct. 1740 (internal quotations omitted).

Finally, the link between species loss and a substantial commercial effect is not attenuated. This holding will not allow Congress to regulate general land use or wildlife preservation. *See id.* at 612-13, 120 S.Ct. 1740 ("We rejected these . . . arguments because they would permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime. . . . '" (quoting *Lopez,* 514 U.S. at 564, 115 S.Ct. 1624)).

ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes. As noted, plaintiffs concede such aggregation substantially affects interstate commerce. In sum, application of ESA's take provision to the Cave Species is a constitutional exercise of the Commerce Clause power.*

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* FWS also contends that the "take" provision enables the United States to meet its treaty obligations and was enacted because of a concern about Congress' Commerce Clause power, pursuant to Article I, § 8, cl. 3, "[t]o regulate Commerce with foreign Nations". We need not reach this issue.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

DENNIS, Circuit Judge, concurring:

I join in the Court's opinion and write separately only to set forth additional analysis in support of the Court's conclusion.

The plaintiffs contend that Congress lacks the authority to regulate, under the ESA, activity that endangers or threatens intrastate, non-commercial species. The Court correctly upholds the challenged ESA provision as applied to such species.

One express purpose of the ESA is to provide a comprehensive program for the conservation of endangered and threatened species and the ecosystems upon which they depend. The extinction or harm of endangered or threatened species has a substantial impact upon interstate commerce because in many cases those species or products derived from them are articles of commerce. Further, their extinction or harm could have a significant deleterious effect upon interstate commerce between the states by adversely affecting the commercial intercourse of non-endangered species or their derivatives. Finally, the conservation of the ecosystems upon which these commercial species depend may require the regulation of activities harmful to non-commercial species concentrated within a single state or region. Consequently, Congress has the authority to make a rational determination to conserve such non-commercial, intrastate species as an essential or integral part of the comprehensive ESA program that

regulates activities having a substantial impact on interstate commerce.

At least as early as *United States v. Darby,* the Supreme Court recognized that Congress has the power to regulate intrastate activities that it rationally finds necessary to regulate in order to effectuate its regulation of interstate commerce.[1] In *Darby,* emphasis was placed on whether the regulation was an "appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."[2] This approach harks back to *McCulloch v. Maryland,* which noted that the Constitution authorizes Congress to make "all laws which shall be necessary and proper for carrying into execution the foregoing powers."[3] Chief Justice Marshall found that the Necessary and Proper clause accords to Congress that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[4]

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[1] 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941).

[2] *Id.* at 118, 61 S.Ct. 451.

[3] 4 Wheat. 316, 17 U.S. 316, 411-12, 4 L.Ed. 579 (1819) (quoting U.S. Const. art. I, § 8, cl. 18); *see* Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946,* 59 Harv. L. Rev. 883, 890 (1946).

[4] *McCulloch,* 17 U.S. at 421.

Darby also pointed out that the Court had often sustained legislation enacted under powers other than the Commerce Clause, "when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government."[5] A similar approach had been used in cases applying the Commerce Clause to intrastate activities "when the intrastate transactions were so commingled with or related to interstate commerce as to demand that all be regulated if the interstate commerce were to be effectively controlled."[6]

Indeed, the Supreme Court's cases, from *Darby* to the present, confirm that Congress has the authority under the Constitution, through the intersection of the Commerce Clause and the Necessary and Proper Clause, to regulate an intrastate activity that it could not reach standing alone, if the regulation is essential or integral to the maintenance of a larger regulatory scheme properly governing interstate commerce.[7] This rule has recently

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[5] *Darby*, 312 U.S. at 121, 61 S.Ct. 451 (citing *Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264, 40 S.Ct. 141, 64 L.Ed. 260 (1920); *James Everard's Breweries v. Day*, 265 U.S. 545, 560, 44 S.Ct. 628, 68 L.Ed. 1174 (1924); *Westfall v. United States*, 274 U.S. 256, 259, 47 S.Ct. 629, 71 L.Ed. 1036 (1927)).

[6] Stern, *The Commerce Clause*, 59 Harv. L. Rev. at 891 (citing *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341 (1914) (Shreveport Rate Cases); *Railroad Comm'n of Wis. v. Chicago Burlington & Quincy Ry. Co.*, 257 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 371 (1922); *Southern Ry. Co. v. United States*, 222 U.S. 20, 32 S.Ct. 2, 56 L.Ed. 72 (1911); *Baltimore & Ohio Ry. Co. v. ICC*, 221 U.S. 612, 31 S.Ct. 621, 55 L.Ed. 878 (1911)).

[7] *See, e.g., United States v. Lopez*, 514 U.S. 549, 561, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (finding that the regulation of gun possession near schools under the Gun-Free School Zones Act was "not

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been designated by one scholar as the "comprehensive scheme" principle.[8] This Court and its judges have, in effect, recognized the principle by concluding that both commercial and noncommercial activity may be regulated by Congress if the regulation is an essential or integral part of a larger comprehensive scheme properly regulating activity substantially affecting interstate commerce.[9]

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an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated"); *Hodel v. Indiana*, 452 U.S. 314, 329 n. 17, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981) ("A complex regulatory program . . . can survive a Commerce Clause challenge without showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies [the substantial effect] test."); *Maryland v. Wirtz*, 392 U.S. 183, 192-93, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968) (refusing to "excise, as trivial, individual instances" of regulation because the effect of such excision would be to undermine the effectiveness of the regulatory program); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 121, 62 S.Ct. 523, 86 L.Ed. 726 (1942) (stating that Congress has the power to enact such regulations of intrastate activity as are "necessary and appropriate" to make the regulation of interstate commerce effective); *Darby*, 312 U.S. at 118, 61 S.Ct. 451 ("[Congress's power] extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."); *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 36, 57 S.Ct. 615, 81 L.Ed. 893 (1937) ("The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce.").

[8] *See* Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?* 46 Vill. L. Rev. 1325 (2001); Adrian Vermeule, *Centralization and the Commerce Clause*, 31 Envtl. L. Rep. 11334 (2001).

[9] *See Groome Resources Ltd. v. Parish of Jefferson*, 234 F.3d 192, 205 (5th Cir.2000) ("[A] close reading of *Lopez* . . . provides two recognized and historically rooted means of congressional regulation under

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The free-standing statutes at issue in *Lopez* and *United States v. Morrison*[10] addressed intrastate offenses of the kind that have been traditionally dealt with by state legislation. Neither statute was an integral or ancillary part of a comprehensive scheme reasonably designed to regulate activity having a substantial effect on interstate commerce. In *Lopez* the Court held that the Gun-Free School Zones Act, which made it a federal offense to knowingly possess a firearm in a known or reasonably recognizable school zone, exceeded Congress' commerce clause authority because the criminalized conduct was not

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the commerce power: (1) whether the activity is 'any sort of economic enterprise, however broadly one might define those terms'; or (2) whether the activity exists as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" (quoting *Lopez*, 514 U.S. at 561, 115 S.Ct. 1624)); *United States v. Bird*, 124 F.3d 667, 675 (5th Cir.1997) ("As a federal criminal statute regulating intrastate *noncommercial* conduct, [the challenged section of the Freedom of Access to Clinic Entrances Act] must be justified, if at all, as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'" (quoting *Lopez*, 514 U.S. at 561, 115 S.Ct. 1624)); *see also United States v. Hickman*, 179 F.3d 230, 231 (5th Cir.1999) (en banc) (Higginbotham, J., dissenting) ("Congress may protect, enhance, or restrict some particular interstate economic market, such as those in wheat, credit, minority travel, abortion service, illegal drugs, and the like, and Congress may regulate intrastate activity as part of a broader scheme."); *United States v. Kirk*, 105 F.3d 997, 1014 (5th Cir.1997) (en banc) (Jones, J., dissenting) (stating that the most critical consideration in determining the constitutionality of a statute prohibiting certain possessions of machine guns is whether it "fulfills the mission of regulating interstate commerce as (1) a regulation of economic activity which, although itself local, has substantial effect on interstate commerce, or (2) a regulation of activity which is essential to maintaining a larger, interstate regime of economic activity.").

[10] *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

an economic activity that substantially affected interstate commerce. The Court expressly noted that the statute was not an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated.[11] Similarly, in *Morrison* the Court held that the Commerce Clause does not authorize Congress to enact a federal civil remedy for the victims of gender-motivated violence. The Court stated that gender-motivated crimes of violence are not economic activity substantially affecting interstate commerce.[12]

In this case, by contrast, the prohibition of the Cave Species takes is integral to achieving Congress's rational purpose in enacting the ESA. In particular, the ESA regulates interstate commerce by attempting to prevent the extinction of both commercial and non-commercial species. Regulations under the ESA therefore significantly affect the nation's economy and welfare. Non-commercial species are in many instances vital to the survival of ecosystems upon which commercial species are dependent. The interrelationship of commercial and non-commercial species is so complicated, intertwined, and not yet fully understood that Congress acted rationally in seeking to protect all endangered or threatened species from extinction or harm. The ESA is a necessary and proper means not only to conserve the nation's valuable biological resources, but also to promote interstate commerce involving those resources. While some states, including Texas, have taken steps to protect species against extinction, the threat of extinction of species and loss of their habitat is

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[11] *Lopez*, 514 U.S. at 561, 115 S.Ct. 1624.

[12] *Morrison*, 529 U.S. at 613, 120 S.Ct. 1740.

both a worldwide and a national problem that requires at least a comprehensive national solution. Furthermore, as the Congress recognized, some of the presently covered non-commercial species will prove to be of "incalculable" future value to the nation and its economy because they are sources of genetic, scientific, and biomedical research and development that will likely facilitate the production of commercial goods, services, and techniques.

Thus, as the opinion states, the constitutionality of the FWS's regulation of the Cave Species takes does not depend on aggregating the effects of all takes of endangered species in order to arrive at a sum effect on interstate commerce that is, post-aggregation, substantial. Put another way, the constitutionality of any particular application of the ESA take provision does not depend on adding up "a large number of small but definite [economic] impacts from each insect or plant of an endangered species" to reach a substantial effect on interstate commerce.[13] Rather, the FWS can prohibit the Cave Species takes because such regulation is essential to the efficacy of – that is, the regulation is necessary and proper to – the ESA's comprehensive scheme to preserve the nation's genetic heritage and the "incalculable" value inherent to that scarce natural resource, and because that regulatory scheme has a very substantial impact on interstate commerce.

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[13] Charles Tiefer, *After Morrison, Can Congress Preserve Environmental Laws from Commerce Clause Challenge?* 30 Envt'l L. Rep. 10888 (2000).

169 F.Supp.2d 648

United States District Court, W.D. Texas, Austin Division.

GDF REALTY INVESTMENTS, LTD., et al.

v.

Gale NORTON, et al.

No. A-00-CA-369SS.

Aug. 30, 2001

ORDER

SPARKS, District Judge.

BE IT REMEMBERED on the 30th day of August 2001 the Court reviewed the file in the above-captioned case and specifically Plaintiffs' Summary Judgment Motion and Brief in Support [#25] and defendants' opposition thereto [#31]; Defendants' Summary Judgment Motion [#30] and Memorandum of Law in Support [#31], plaintiffs' amended response thereto [#39], defendants' reply thereto [#41] and plaintiffs' supplemental letter brief [#47]. After considering the motions, responses and supplemental brief, the case file as a whole and the applicable law, the Court enters the following opinion and order.

This is a declaratory relief action and request for injunctive relief brought by plaintiffs GDF Realty Investments, Ltd., Parke Properties I, L.P. and Parke Properties II, L.P. ("plaintiffs") against defendants Gale Norton and Marshall P. Jones, in their official capacities as Secretary

of the Interior and Director of the U.S. Fish and Wildlife Service, respectively ("defendants").[1]

Factual and Procedural Background

Sometime in 1983, plaintiffs bought approximately 216 acres of undeveloped land in Travis County, Texas, near the intersection of two major state highways, FM 620 and FM 2222 ("the Property"). *See* Complaint, ¶ 30; *see also* Plaintiffs' Summary Judgment Motion, Ex. C, Affidavit of Fred Purcell ("Purcell Affidavit"), ¶¶ 1-3 and Tab 1. The Property is home to six species of invertebrates that, outside of museum and research collections, are located entirely within underground caves in Travis and Williamson Counties, in central Texas. *See, e.g.,* Plaintiffs' Summary Judgment Motion, Ex. A.[2] Shortly after buying the Property (which plaintiffs estimate has a fair market value of $60 million), plaintiffs sought to commercially develop it. *See* Purcell Affidavit, ¶¶ 3-4 ("Located at the intersection of two major highways in one of the most

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[1] Although plaintiffs originally brought this lawsuit against Bruce Babbitt and Jamie Rappaport Clark, in their respective capacities as Secretary of the Interior and Director of the Fish & Wildlife Service, defendants Norton and Jones are the current successors to these positions, following the 2000 presidential election. Accordingly, Norton and Jones, in their official capacities, are "automatically substituted" as the defendants in this lawsuit. *See* Fed.R.Civ.P. 25(d)(1).

[2] These six species are: (1) the Tooth Cave pseudoscorpion (*Microcreagis texana*); (2) the Tooth Cave spider (*Leptoneta myopica*); (3) the Bee Cave Creek harvestman (*Texella reddelli*); (4) the Tooth Cave ground beetle (*Rhadine persephone*); (5) the Kretschmarr Cave mold beetle (*Texamaurops reddelli*); and (6) the Bone Cave harvestman (*Texella reyesi*). Hereafter, the Court will collectively refer to these six species as "the Cave Species."

rapidly growing areas of Texas, the Property is an extremely valuable piece of real estate."). However, according to plaintiffs, "Defendants' land use restrictions on the Property resulting from the Endangered Species Act" have prevented plaintiffs "from making economic use of the Property." *See id.* ¶¶ 6 and 15.

In March 1985, James Reddell, assistant curator at the Texas Memorial Museum for the University of Texas, sought plaintiffs' permission to enter the Property to begin "a long-term study" of the Cave Species and other invertebrates living in the caves on the Property. *See* Purcell Affidavit, Tab 2, at FP-00234.

On September 16, 1988, the federal government, pursuant to the ESA, issued a final rule listing five of the Cave Species as endangered.[3] *See* Plaintiffs' Summary Judgment Motion, Ex. A (reprinting 53 Fed.Reg. 36029 (Sept. 16, 1988)). The final rule stated:

> Each of these species is known from only six or fewer small, shallow, dry caves near Austin in Travis and Williamson Counties, Texas. Urban, industrial and highway expansion are planned or ongoing in the area containing the cave habitat of these species. This development could result in filling or collapse of these shallow caves. . . .

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[3] The rule does not mention the Bone Cave harvestman. Although the record does not indicate when this species was placed on the endangered list, plaintiffs do not dispute it is classified as endangered by the federal government. None of the six Cave Species, however, are listed as endangered by the Texas state government. *See, e.g.*, Texas Parks and Wildlife Department, *Texas Threatened and Endangered Invertebrates, at* http://www.tpwd.state.tx.us/nature/endang/animals/invertebrates.htm (last modified Aug. 3, 2001).

See id. at 32029-30. The rule further stated that four of the species were located only in Tooth Cave, Amber Cave, and Kretschmarr Cave, all in the Jollyville Plateau in Travis County. *See id.* at 36030. These caves are located on or near the Property. *See* Purcell Affidavit, Tab 1. The rule also stated all five species had been studied and collected by several scientists since the 1960s and 1970s, and articles regarding these species had been published in national scientific publications and at least one international journal. *See* Plaintiffs' Summary Judgment Motion, Ex. A, at 36030 and 36032. The rule indicated the study of these species was ongoing, stating that one reason for listing the species as endangered was "[c]ollection [of the species] for scientific or educational purposes could become a threat if [their] localities become generally known." *See id.* at 36031. The rule stated the main reason the species were listed as endangered was "[t]he primary threat to the five species comes from potential loss of habitat owing to ongoing development activities," and that the species' caves "are in an area for which a major residential, commercial, and industrial development has been proposed." *See id.* The rule concluded:

> These species require the maximum possible protection provided by the Act because their extremely small, vulnerable habitats are within an area that can be expected to experience continued pressures from economic and population growth.

See id. at 36032.

On March 2, 1989, shortly after this final rule was issued, defendants began asserting jurisdiction over the Property, on the grounds that plaintiffs' proposed development and "commercial activities" could constitute a take

of "the endangered Texas cave invertebrates." *See* Purcell Affidavit, Tab 2, at GDF 2824-30 (letter from Fish & Wildlife Service). In response, plaintiffs stated it was their intention to donate some caves on the Property to scientific research for "one year," place fences around all the caves, and commercially develop the remainder of the Property: "[A] shopping center . . . will be constructed around Tooth Cave. Similar development will occur around the other caves to be donated." *See id.* at GDF 2906-08 (September 20, 1989 letter from plaintiffs).

Negotiations for commercial development of the Property continued between the parties for the next several years. According to plaintiffs, sometime in 1993 defendants asserted regulatory jurisdiction over plaintiffs' "clearing activities on the Property" as well as plaintiffs' "development activities on the Property," informing plaintiffs that these activities violated the ESA's take provision. *See* Purcell Affidavit, ¶ 18.

On June 2, 1994, defendants informed plaintiffs that their proposed development of the Property would cause "habitat destruction and degradation" and, as a result, "the development as proposed will, more likely than not, constitute an ESA Section 9 take of endangered species by 'killing' or 'harming' or 'harassing' individuals so as to increase the likelihood, or cause, actual injury by significantly impairing essential breeding, feeding or sheltering behaviors." *See* Purcell Affidavit, Tab 4, at 004159 (letter from Fish & Wildlife Service. Defendants stated the five species listed in the September 16, 1988 final rule, as well as the Bone Cave harvestman, likely would be taken by the proposed development. *See id.* at 004164. Defendants also noted the proposed development would include "residential housing . . . research and development facilities, a

golf course, office facilities and commercial development." *See id.* at 004159.

Negotiations between the parties regarding development of the Property continued. On December 30, 1997, plaintiffs applied for several Section 10(a) incidental take permits,[4] to develop "a shopping center, a residential subdivision, and office buildings" on the Property. *See* Purcell Affidavit, ¶ 27.[5] When defendants failed to reasonably act on these applications, plaintiffs sought judicial relief. On June 7, 1999, this Court issued an order holding that defendants had, by their inaction and through a recently-filed declaration, issued a final agency action denying plaintiffs' December 1997 applications for incidental take permits under Section 10(a). The Court found defendants had acted "totally irresponsibly" in intentionally delaying a ruling on the applications, and that defendants' conduct in so doing was "simply wrong."

According to plaintiffs, at this point defendants had "established benchmarks prohibiting any development of

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[4] Under Section 10(a), a property owner who believes his development may constitute a "take" under Section 9 can apply to the Secretary of the Interior for an "incidental take" permit, which allows "any taking otherwise prohibited by [Section 9] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." *See* § 16 U.S.C. § 1539(a)(1)(B).

[5] In his affidavit, Purcell represents that, prior to these December 1997 Section 10(a) permit applications, defendants "had never voiced any objections to our proposed development as a threat to the Cave Bugs." *See id.* ¶ 28. However, this statement is directly contradicted by the correspondence attached to Purcell's affidavit and discussed above, including the March 1989 and June 1994 letters from defendants, both of which directly and prominently explain defendants' belief that plaintiffs' proposed development will harm the Cave Species.

the Property above certain elevation contour lines" because of harm to the Cave Species. *See* Purcell Affidavit, ¶ 33. Also according to plaintiffs, defendants' "repeated disapproval of development plans" for the Property had deprived plaintiffs of "several lucrative opportunities for the use and enjoyment of the Property," and defendants' "restrictions on our use and enjoyment of the Property has caused and continues to cause severe economic harm." *See id.* ¶¶ 30 and 36.

While still trying to get defendants to reconsider their denial of the Section 10(a) permits, plaintiffs tried another approach by filing this lawsuit on June 15, 2000, arguing for the first time that Section 9 of the ESA was unconstitutional as applied by defendants.

The premise for plaintiffs' constitutional claim is that defendants have "consistently asserted regulatory jurisdiction over the development activities on the Plaintiffs' property," on the basis that "Plaintiffs' proposed development plans will cause 'take' of the Cave Bugs in violation of § 9(a)(1)(B) of the ESA." *See* Plaintiffs' Summary Judgment Motion, at 4. Plaintiffs contend this application of Section 9 exceeds the authority granted to Congress under the Commerce Clause of the United States Constitution. Plaintiffs therefore "seek a declaration that, as-applied to the six listed endangered cave invertebrates living on or in close proximity to Plaintiffs' property, the 'take' provision of the ESA, 16 U.S.C. § 1538(a)(1)(B), is unconstitutional." *See* Complaint, ¶¶ 9 and 59. Plaintiffs also request an order "permanently enjoin[ing] the Defendants from enforcing Section 9 of the ESA as it is applied to the Cave Bugs." *See id.* ¶ 61.

Both parties now seek summary judgment. In their motion, plaintiffs ask the Court to rule defendants' application of Section 9 exceeds Congress' authority under the Commerce Clause because it does not regulate: (1) channels of interstate commerce; or (2) an activity that "substantially affects" interstate commerce. *See* Plaintiffs' Summary Judgment Motion, at 5-6. Defendants argue plaintiffs' summary judgment motion should be denied in full. In their cross-motion, defendants ask the Court to rule that "Defendants' application of Section 1568(1)(a)(B) of the Endangered Species Act in this case is constitutional, as a valid exercise of Congressional power under the Commerce Clause." *See* Defendants' Cross Motion for Summary Judgment, at 1-2.[6]

Summary Judgment Standard

Summary judgment may be granted if the moving party shows there is no genuine issue of material fact, and it is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). In deciding summary judgment, the Court should "construe all facts and inferences in the light most favorable to the nonmoving party." *See Hart v. O'Brien,* 127 F.3d 424, 435 (5th Cir.1997), *cert. denied,* 525 U.S. 1103, 119 S.Ct. 868, 142 L.Ed.2d 770 (1999). The standard for determining whether to grant summary judgment "is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party

[6] Presumably, defendants meant to cite Section 1538(a)(1)(B), as that is the statute at issue in this case, and because there is no Section 1568 of the ESA, much less a Section 1568(1).

based upon the record evidence before the court." *James v. Sadler,* 909 F.2d 834, 837 (5th Cir.1990). Both parties bear burdens of producing evidence in the summary judgment process. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). However, "[n]either conclusory allegations nor unsubstantiated assertions" will satisfy either party's burden. *See Wallace v. Texas Tech Univ.,* 80 F.3d 1042, 1047 (5th Cir.1996).

Analysis

Congress may only enact laws pursuant to one of its enumerated constitutional powers. *See Marbury v. Madison,* 5 U.S. 137, 1 Cranch 137, 176, 2 L.Ed. 60 (1803). Under the Commerce Clause, Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, § 8. Plaintiffs argue defendants' application of the ESA's take provision to the Cave Species goes beyond the scope of this power, and therefore is invalid. To succeed on this argument, plaintiffs must make a "plain showing" that defendants' application is unconstitutional. *See United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 1748, 146 L.Ed.2d 658 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.").

I. Plaintiffs' As-Applied Challenge

This lawsuit involves an as-applied constitutional challenge to the ESA's take provision.[7] *See, e.g.,* Complaint, ¶ 9 ("Plaintiffs seek a declaration that, as-applied to the six listed endangered cave invertebrates living on or in close proximity to Plaintiffs' property, the 'take' provision of the ESA, 16 U.S.C. § 1538(a)(1)(B), is unconstitutional."); *see also* Defendants' Summary Judgment Motion, at 1-2 (seeking ruling that "Defendants' application of Section 1568(1)(a)(B) of the Endangered Species Act in this case is constitutional."). As plaintiffs repeatedly make clear, they are not raising a facial constitutional challenge in this lawsuit.[8] *See, e.g.,* Plaintiffs' Response [#39], at 18

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[7] For purposes of this lawsuit, there is no dispute that plaintiffs' proposed development of the Property would constitute a take of the Cave Species. *See, e.g.,* Plaintiffs' Summary Judgment Motion, at 10-11; Plaintiffs' Response, at 14 and n. 14. The ESA's take provision, also referred to as Section 9 of the ESA, makes it unlawful to "take" any endangered species. *See* 16 U.S.C. § 1538(a)(1)(B). The federal rules adopted for the ESA have defined "take" to include "significant habitat modification or degradation [that] actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding or sheltering." *See* 50 C.F.R. § 17.3. The record indicates defendants are applying this latter regulation, known as the "habitat modification" regulation, to plaintiffs' proposed development of the Property. *See, e.g.,* Complaint, ¶ 27; Purcell Affidavit, Tab 4, at 004159 and 004166; Plaintiffs' Response, at 10 n. 9. The Supreme Court has expressly upheld 50 C.F.R. § 17.3 on its face, as being a reasonable interpretation of the ESA. *See Babbitt v. Sweet Home Chapter of Communities of Great Or.,* 515 U.S. 687, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995).

[8] A facial challenge seeks to invalidate a particular regulation "in every circumstance." *See Sweet Home,* 115 S.Ct. at 2414; *see also United States v. Salerno,* 481 U.S. 739, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987) ("A facial challenge is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."); *Stenberg v.*

(Continued on following page)

("[T]his is not a facial challenge to the take provision; thus the constitutionality of Congress' act is not at issue. . . . [T]his case is not a facial challenge to the take provision, much less to the ESA as a whole.").[9]

Carhart, 530 U.S. 914, 120 S.Ct. 2597, 2655, 147 L.Ed.2d 743 (2000) (Thomas, J., dissenting) ("The only question [in a facial challenge] is whether [defendant] has shown that no set of circumstances exists under which the Act would be valid.") (internal quotations and citation omitted).

[9] Plaintiffs wisely do not raise a facial challenge. The ESA's take provision and 50 C.F.R. § 17.3 are essential parts of a larger statute reasonably enacted to regulate activities substantially affecting interstate commerce, including: balancing "economic growth and development" against preserving endangered species; preserving a natural resource that has "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people"; and preserving the potential resources found in *every* species, including their genetic information. *See, e.g.*, 16 U.S.C. § 1531(a); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 2298, 57 L.Ed.2d 117 (1978) ("*TVA*") ("[T]he plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.' "); *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 1168, 137 L.Ed.2d 281 (1997) ("economic consequences are an explicit concern of the ESA"). Thus, these regulations would easily survive a facial Commerce Clause challenge. *See, e.g., Gibbs v. Babbitt*, 214 F.3d 483, 497 (4th Cir.2000), *cert. denied*, 531 U.S. 1145, 121 S.Ct. 1081, 148 L.Ed.2d 957 (2001) ("Congress undoubtedly has the constitutional authority to pass legislation for the conservation of endangered species."); *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1057 (D.C.Cir.1997), *cert. denied*, 524 U.S. 937, 118 S.Ct. 2340, 141 L.Ed.2d 712 (1998) ("*NAHB*") ("We hold that section 9(a)(1) of the Endangered Species Act is within Congress' Commerce Clause power."). *Cf. Hodel v. Indiana*, 452 U.S. 314, 101 S.Ct. 2376, 2386 n. 17, 69 L.Ed.2d 40 (1981) ("It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test [of being rationally related to regulating interstate commerce]."); *United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir.1977) ("The nature of such a bill [the Marine Mammal Protection Act] is based on the control that a sovereign

(Continued on following page)

A Commerce Clause challenge focuses on the activity being regulated, and its relation to interstate commerce. *See United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 1629-30, 131 L.Ed.2d 626 (1995). In an as-applied Commerce Clause challenge, the regulated activity is defined in terms of, and thus is limited to, the specific facts of the case. *See, e.g., NAHB,* 130 F.3d at 1059 (Henderson, J., concurring) (denying as-applied constitutional challenge because "application of Section 9 of ESA here acts to regulate commercial development of the land inhabited by the endangered species"); *see also Jones v. United States,* 529 U.S. 848, 120 S.Ct. 1904, 1909, 146 L.Ed.2d 902 (2000) (framing as-applied Commerce Clause challenge as "whether [the statute's] application to the private residence in the present case is constitutional"); *Lopez,* 115 S.Ct. at 1630 (citing *Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), a Commerce Clause challenge to federal Act governing wheat quotas, as "sustaining the application of the Act to Filburn's activity" of home consumption); *United States v. Jimenez,* 256 F.3d 330, 337 (5th Cir.2001) (as-applied Commerce Clause challenge "turns on whether the property was used in an activity affecting interstate commerce"); *United States v. Kallestad,* 236 F.3d 225, 228 (5th Cir.2000) (analyzing specific conduct of defendant for purposes of as-applied Commerce Clause challenge); *United States v. Corp,* 236 F.3d 325, 332-33 (6th Cir.2001) (as-applied Commerce Clause challenge is "a determination on a case-by-case basis about

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such as the United States has over the natural resources within its territory. It can exploit them or preserve them or establish a balance between exploitation and preservation.").

whether the activity involved in a certain case had a substantial effect on commerce"); *United States v. Dorris,* 236 F.3d 582, 586 (10th Cir.2000), *cert. denied,* 532 U.S. 986, 121 S.Ct. 1635, 149 L.Ed.2d 495 (2001) ("[T]he challenge [in *Jones*] was as applied rather than facial, as it is here. The Court in *Jones* considered the connection of a specific home to interstate commerce and found it wanting."). Here, the regulated activity is plaintiffs' alleged take of the Cave Species through their proposed commercial development of the Property. *Cf. Sweet Home,* 115 S.Ct. at 2412 (describing specific conduct regulated by take provision as "logging activities" destroying habitat of two endangered species).

A fundamental flaw in plaintiffs' argument is their overly-broad definition of the regulated activity at issue. Plaintiffs seek to invalidate the take provision as applied to all "takes" of the Cave Species. *See, e.g.,* Plaintiffs' Brief, at 2 ("Plaintiffs contend that the regulated activity – *takes* of the Cave Bugs – cannot be supported by the Commerce Clause.") (emphasis added); Plaintiffs' Summary Judgment Motion, at 6 ("Congress lacks authority under the Commerce Clause to regulate *takes* of the Cave Bugs on the Property.") (emphasis added); Plaintiffs' Response, at 18 ("This case presents the substantially more narrow question of whether the take provision can be constitutionally applied to the Cave Bugs."). But this lawsuit does not involve all takes of the Cave Species, or even all takes of the Cave Species on the Property. Rather, this case involves defendants' regulation of one specific take – the

alleged take of the Cave Species by plaintiffs' proposed commercial development of the Property.[10]

Allowing plaintiffs to challenge the constitutionality of Section 9 as-applied to takes of the Cave Species in general, rather than plaintiffs' specific conduct, contradicts "the general rule that constitutional adjudication requires a review of the application of a statute to the conduct of the party before the Court." *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 104 S.Ct. 2118, 2125, 80 L.Ed.2d 772 (1984). A plaintiff can either challenge *all* applications of a statute (*i.e.,* a facial challenge), or the statute as-applied to the plaintiff's particular conduct – but he cannot take the middle ground and challenge the statute as-applied to a general class of activity into which his conduct also falls. *See, e.g., ABATE of Georgia, Inc. v. Georgia,* 137 F.Supp.2d. 1349, 1355 (N.D.Ga.2001) ("[A]s-applied challenges are fact-specific. They cannot be brought on behalf of a class; they must be brought on a case-by-case basis."). This principle stems from the basic rule that a court may decide only the actual case or controversy that is before it:

> This Court, as is the case with all federal courts, has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because

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[10] This is not a case where a federal regulation has been enacted applying Section 9 to every possible take of the Cave Species. *Cf. Gibbs,* 214 F.3d 483 (overruling facial Commerce Clause challenge to 50 C.F.R. § 17.84, which prohibits taking of all red wolves). Nor is it a case where plaintiffs are challenging the federal regulation listing the Cave Species as endangered. *Cf. Building Indus. Ass'n of Superior Cal. v. Babbitt,* 979 F.Supp. 893 (D.D.C.1997) (overruling facial Commerce Clause challenge to listing of fairy shrimp as endangered).

> irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by . . . . the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. . . . The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined.

United States v. Raines, 362 U.S. 17, 80 S.Ct. 519, 523, 4 L.Ed.2d 524 (1960). In sum, plaintiffs cannot challenge Section 9 as-applied to takes of the Cave Species in general.[11] They may challenge Section 9 as-applied only to *their* alleged take. Thus, as stated, the regulated activity in this lawsuit is plaintiffs' alleged take of the Cave Species through their proposed commercial development of the Property.

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[11] In framing their challenge in this manner, plaintiffs make the same mistake as the dissent in *NAHB,* which argues the take provision is unconstitutional as applied to "killing flies" and as applied in the abstract to "controlling weeds or digging holes." *See, e.g., NAHB,* 130 F.3d at 1064 (Sentelle, J., dissenting). As noted, however, this argument runs against the well-established rule that a plaintiff may constitutionally challenge either the application of a statute to *his own conduct,* or he may argue the statute, on its face, does not constitutionally apply to *any* conduct – he may not strike down the statute as unconstitutionally applied to some abstract class or subset of conduct.

II. Commerce Clause Analysis

Two recent Supreme Court decisions, *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) and *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), provide the starting point for analyzing whether defendants' application of Section 9 to plaintiffs' alleged take is a valid exercise of the Commerce Clause power. Although both cases involve facial constitutional challenges, they establish the general rule that the Commerce Clause allows regulation of three "broad categories" of activity: (1) use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Lopez,* 115 S.Ct. at 1629-30; *Morrison,* 120 S.Ct. at 1749. The Court finds the regulated activity in this case easily falls under the third category.[12]

In *Morrison,* the Supreme Court set forth four "considerations" in determining whether the activity being regulated substantially affects interstate commerce. The Fifth Circuit has defined these considerations as follows:

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[12] The Court therefore need not, and does not, analyze whether the regulated activity also falls under the first and second categories. With respect to the first category, however, the Court does note that the Property is located at the corner of two major state highways that are both directly connected to Interstate Highway 35, and plaintiffs' proposed development would affect these highways. *Cf. Caminetti v. United States,* 242 U.S. 470, 37 S.Ct. 192, 197, 61 L.Ed. 442 (1917) ("[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.").

> (1) whether the statute regulates 'commerce,' or an activity that might be deemed an 'economic activity,' broadly defined;
>
> (2) whether the statute has an 'express jurisdictional element' that restricts its application to activities that have 'an explicit connection with or effect on interstate commerce';
>
> (3) whether congressional findings support the judgment that the activity in question has a substantial effect on interstate commerce; and
>
> (4) whether the act made an offense has an attenuated relationship to that substantial effect on interstate commerce.

Kallestad, 236 F.3d at 227-28 (quoting *Morrison,* 120 S.Ct. at 1749-51).

It is questionable whether these four considerations apply in this case. Courts applying the *Morrison* considerations have done so in cases involving facial Commerce Clause challenges. *See Kallestad,* 236 F.3d at 228; *Gibbs,* 214 F.3d 483; *NAHB,* 130 F.3d at 1057.[13] In purely as-applied Commerce Clause challenges, the courts have analyzed only the effect of the specific activity on interstate commerce. *See Jimenez,* 256 F.3d at 339 (finding

[13] The procedural posture of *NAHB* is not entirely clear. While the majority makes reference to an as-applied challenge, in fact it analyzes only whether the take provision is constitutional on its face, under the Commerce Clause. Answering this question in the affirmative, it then concludes any application of the take provision (and therefore the particular application before it) is constitutional. The concurring opinion first concludes the take provision as a whole is constitutional, then concludes the application to the particular conduct at issue – building a hospital – is constitutional.

specific home office being regulated "would easily be classified as substantially affecting interstate commerce," without applying *Morrison* considerations). *Cf. Jones,* 120 S.Ct. at 1910 (finding "home owned and occupied by petitioner Jones's cousin was not so used [in interstate commerce, as defined by statute] – it was a dwelling place used for everyday family living," without applying *Morrison* considerations). The Court finds that, under either approach, defendants' application of the take provision passes Commerce Clause muster.

A. Effect of Specific Activity on Interstate Commerce

As noted, the regulated activity in this case is plaintiffs' alleged take of the Cave Species by their planned development of the Property. This development includes plans to build "a shopping center, a residential subdivision, and office buildings" on the Property. *See* Purcell Affidavit, ¶ 27. It also includes plaintiffs' proposal to build a Wal-Mart and an apartment complex on the Property. *See* Defendants' Summary Judgment Motion, Ex. 1. This activity, standing alone, "would easily be classified as substantially affecting interstate commerce." *See Jimenez,* 256 F.3d at 339 (upholding application of federal arson statute to single home office; finding home office substantially affected interstate commerce because it was primary location of a small construction business with gross receipts of $20,000 per month and payroll of $8,000 per month, and was location of business records and company vehicles); *NAHB,* 130 F.3d at 1059 (Henderson, J., concurring) (upholding application of take provision to "proposed redesigned traffic intersection and the hospital which it is intended to serve, each of which has an obvious connection with interstate commerce"). *Cf. Russell v. United States,*

471 U.S. 858, 105 S.Ct. 2455, 2457, 85 L.Ed.2d 829 (1985) ("The rental of real estate is unquestionably such an activity [that affects commerce].").

Plaintiffs mistakenly focus only on the commercial aspects (or, in their view, the complete lack thereof) of the Cave Species. However, the activity regulated in this case is not simply the Cave Species. It is an alleged take of the Cave Species through plaintiffs' development of the Property. Plaintiffs cannot simply ignore the commercial nature of their activity. *See, e.g., Groome Res., Ltd. v. Parish of Jefferson,* 234 F.3d 192, 204 (5th Cir.2000) (indicating regulated activity is examined in terms of the "actors" and the "conduct" being regulated) (quoting *Morrison,* 120 S.Ct. at 1750).[14] Indeed, plaintiffs themselves repeatedly describe

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[14] This is similar to another problem underpinning the *NAHB* dissent – the primary authority relied on by plaintiffs. Specifically, the dissent in *NAHB* acknowledges the "activity regulated in the present case" as being "local land-use" and "involv[ing] the application of the ESA to the building of a hospital and supporting infrastructure," but concludes this activity is not "commercial." *See NAHB,* 130 F.3d at 1064-66. This ignores the plain fact that a hospital, its construction, and the re-design of the adjacent traffic intersection are all commercial activities. For this and several other reasons, the dissent in *NAHB* is wholly unpersuasive. *See also* John C. Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly,* 97 MICH.L.REV. 174 (1998) (explaining, in a well-reasoned article, the flaws in the *NAHB* dissent). Indeed, accepting plaintiffs' argument – that the Court should examine only the intrastate, non-economic nature of the Cave Species – likely would nullify the take provision as-applied in *TVA,* the primary Supreme Court decision on the ESA. In *TVA,* the ESA was applied to enjoin federal construction of a dam, to prevent the "destruction or modification of [the] habitat area" of the endangered snail darter fish. *See TVA,* 98 S.Ct. at 2286. The non-commercial snail darter, however, was located solely within Tennessee: "[T]he snail darter apparently lives only in that portion of the Little Tennessee River [an area near Knoxville] which would be completely inundated by the reservoir

(Continued on following page)

defendants' application of the take provision in terms of the planned development of the Property. *See, e.g.,* Plaintiffs' Summary Judgment Motion, at 4 (stating defendants have "consistently asserted regulatory jurisdiction over the development activities on the Plaintiffs' property," on the basis that "Plaintiffs' proposed development plans will cause 'take' of the Cave Bugs in violation of § 9(a)(1)(B) of the ESA.").

Plaintiffs also contend the focus should not be on their planned commercial development of the Property because this type of activity is "not addressed by the express terms" of the take provision. *See* Plaintiffs' Response, at 11-12. However, the take provision broadly applies to any habitat modification that actually injures or kills endangered species by significantly impairing their essential behavioral patterns. Thus, it unquestionably covers commercial developments that have this effect. Indeed, one of the express purposes of the ESA is to prevent such developments from extinguishing endangered species. *See* 16 U.S.C. § 1531(a) (finding ESA was needed to protect species from being "rendered extinct by economic growth and development").[15]

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created as a consequence of the Tellico Dam's completion." *Id.* at 2285. In addition, adopting this argument would turn the ESA on its head: "According to plaintiffs, if a species is abundant and scattered plentifully across state lines, Congress is fully empowered under the Commerce Clause to protect it. But when that same species becomes more scarce and its population reduced to a single state, Congress's hands are suddenly tied." *Building Indus. Ass'n of Superior Cal.,* 979 F.Supp. at 907-08.

[15] Thus, plaintiffs' citation to *Solid Waste Agency of No. Cook County v. United States Army Corps of Eng'rs,* 531 U.S. 159, 121 S.Ct.

(Continued on following page)

Moreover, because the regulated activity in this case is economic in nature, the Court may aggregate the effects of similar activity for the purpose of determining the effect on interstate commerce. *See Morrison,* 120 S.Ct. at 1750 n. 4 (noting "the *Wickard* aggregation principle" applies when "the regulated activity was of an apparent commercial character"); *Jimenez,* 256 F.3d at 338; *United States v. Gray,* 260 F.3d 1267, 1274, n. 2 (11th Cir.2001) ("Under the aggregation theory, economic activity that may not itself substantially affect interstate commerce may be regulated under the Commerce Clause if that conduct, in the aggregate, would have such a substantial effect."). Under this principle, it is obvious that the effect of building Wal-Marts and apartment complexes, in the aggregate, quite substantially affects interstate commerce.

Finally, merely because a federal regulation is designed to *restrict* interstate commerce does not render the regulation unconstitutional. A regulation restricting commerce is still a regulation affecting commerce. *See, e.g., Gibbs,* 214 F.3d at 495 ("It is well-settled under Commerce Clause cases that a regulation can involve the

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675, 148 L.Ed.2d 576 (2001) is misplaced. Plaintiffs contend the Supreme Court in that case was "highly skeptical" of the government's argument that "a municipal landfill" fell within the Clean Water Act's regulation of "navigable waters." *See* Plaintiffs' Response, at 12. Whether this is true or not, it has no bearing here. A "proposed commercial development" is indisputably within the type of activity Congress intended to be regulated by the ESA and the take provision. The *Solid Waste* dicta cited by plaintiffs is therefore inapplicable in this case. *Cf. Solid Waste,* 121 S.Ct. at 684 ("[W]e find nothing approaching a clear statement from Congress that it intended [the Clean Water Act] to reach an abandoned sand and gravel pit such as we have here.").

promotion or the restriction of commercial enterprises and development.").

In sum, the Court finds defendants' application of the take provision in this case is a constitutional exercise of the Commerce Clause power, because the activity being regulated, both standing alone or under the aggregation principle, would easily be classified as substantially affecting interstate commerce.[16]

B. Application of *Morrison* Considerations

1. Economic Nature of Regulated Activity

Assuming the *Morrison* considerations fully apply to an as-applied challenge, the first inquiry is into "the economic nature of the regulated activity." *See Groome,* 234 F.3d at 204. The Supreme Court has established a fairly low hurdle here, indicating a regulated activity will

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[16] In addition, the Court finds a genuine fact issue exists as to whether the regulated activity in this case also substantially affects the interstate scientific research market. *See Gibbs,* 214 F.3d at 494 ("Scientific research generates jobs."). The summary judgment evidence indicates scientists across the country have studied the Cave Species and transported them to/from the American Museum of Natural History in New York, the California Academy of Sciences, the Academy of Natural Sciences in Philadelphia, the Field Museum of Natural History in Chicago, and the Texas Memorial Museum. *See* Defendants' Summary Judgment Motion, Ex. 3, Tab B, at 157, 207-11 and 221; Tab C, at 242 and 249. The Cave Species were listed as endangered in part because "[c]ollection [of the species] for scientific or educational purposes could become a threat if [their] localities become generally known." *See* 53 Fed.Reg. at 36031. However, because this issue is independent from the grounds on which the Court grants summary judgment for defendants, it is unnecessary to preserve the issue for trial.

be considered non-economic only if it has "nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms." *Morrison,* 120 S.Ct. at 1749; *see also id.* at 1750-51 (stating regulated activity need only be "some sort of economic endeavor" or be economic "in any sense of the phrase"); *Groome,* 234 F.3d at 208 ("[T]he *Morrison* Court provided an expansive reading of economic activity that affected interstate commerce, including as it did *Wickard's* regulation of homegrown and home-consumed wheat."). Similarly, the Fifth Circuit has stressed "[t]his circuit has also recognized a broad reading of commercial and economic activities under the Commerce Clause." *Id.; see also United States v. Bailey,* 115 F.3d 1222, 1228 n. 7 (5th Cir.1997), *cert. denied,* 522 U.S. 1082, 118 S.Ct. 866, 139 L.Ed.2d 764 (1998) ("The construction of the term 'commerce' is a practical one and embraces economic activity beyond that which is traditionally considered commerce."). Finally, the Fifth Circuit has indicated "the economic nature of the regulated activity" may be examined in terms of whether "the 'actors' [or] the 'conduct' of the regulation has a commercial character." *See Groome,* 234 F.3d at 204 (quoting *Morrison,* 120 S.Ct. at 1750).[17]

Plaintiffs' alleged take of the Cave Species by their planned development of the Property clearly qualifies as economic activity. Activity doesn't get much more economic or commercial in character than building a Wal-Mart,

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[17] Thus, the inquiry is not limited "only to the terms of the statute," as plaintiffs contend. *See* Plaintiffs' Response, at 12. This is particularly true when, as here, there is no facial challenge to a statute or regulation.

office buildings, and an apartment complex. The regulated activity at issue in this case clearly passes the first *Morrison* consideration.

2. Jurisdictional Element

The second *Morrison* consideration is whether the statute has an "express jurisdictional element" that restricts its application to activities that have "an explicit connection with or effect on interstate commerce." Neither the take provision nor 50 C.F.R. § 17.3 have such a jurisdictional element. However, because this is not a facial challenge, a jurisdictional element is not required, and likely is not even applicable. *See United States v. Bird,* 124 F.3d 667, 676 n. 8 (5th Cir.1997), *cert. denied,* 523 U.S. 1006, 118 S.Ct. 1189, 140 L.Ed.2d 320 (1998) ("In any event, jurisdictional elements do not necessarily preclude 'as-applied' Commerce Clause challenges."). In addition, because of the obvious economic and interstate nature of the specific activity being regulated in this case, the jurisdictional element inquiry is not relevant. *See Groome,* 234 F.3d at 211 ("We do note, however, that the requirement of a jurisdictional element in both *Morrison* and *Lopez* is relevant only because there was no obvious interstate economic connection in those cases.").

3. Legislative History

The third consideration under the *Morrison* analysis is whether legislative history supports a judgment that the activity in question has a substantial effect on interstate commerce. *See Groome,* 234 F.3d at 211. The Fifth Circuit has stated this factor is relevant primarily when the regulated activity "deal[s] with an invisible effect" on

interstate commerce. *See id.* In addition, as plaintiffs acknowledge in their summary judgment brief, "formal findings by Congress are not required" for a valid Commerce Clause regulation. *See* Plaintiffs' Brief in Support, at 5.

As discussed, the regulated activity in this case clearly does not deal with some "invisible effect" on interstate commerce. Therefore, this consideration is not particularly relevant here. In any event, the legislative history of the ESA contains ample findings demonstrating a relationship between the take provision and interstate commerce. The ESA findings state that the Act was passed to address "various species of wildlife . . . [that] have been rendered extinct by economic growth and development." *See* 16 U.S.C. § 1531(a).[18] The findings also state the ESA was designed to protect the "value" of all species as a natural and commercial resource, because of their "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." *See id.* Quoting from the legislative history, the Supreme Court described the following as "[t]ypifying the sentiments" of Congress in enacting the ESA:

> The value of [our] genetic heritage is, quite literally, *incalculable.* From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations.

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[18] A similar justification was given for listing the Cave Species as endangered. *See* 53 Fed.Reg. 36029, 36031 (Sept. 16, 1998) ("The primary threat to the five species comes from potential loss of habitat owing to ongoing development activities."); *see also* Texas Parks and Wildlife Department, *Texas Threatened and Endangered Invertebrates, at* http://www.tpwd.state.tx.us/nature/endang/animals/kretscv.htm (last modified Dec. 10, 1999) (stating that "primary threat" to Cave Species is "the loss of habitat due to urban development").

> The reason is simple: *they are potential resources.* Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed?

TVA, 98 S.Ct. at 2293-94 (quoting H.R.Rep. No. 93-412, at 4-5, U.S.Code Cong. & Admin.News 1973, p. 3001 (1973)) (emphasis added). The Supreme Court also noted Congress' intent, in passing the ESA, to strike a balance between economic growth and protecting endangered species (albeit a balance heavily in favor of the latter):

> Quite obviously, it would be difficult for a court to balance the loss of a sum certain – even $100 million – against a congressionally declared 'incalculable' value, even assuming we had the power to engage in such a weighing process, which we emphatically do not. . . . Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.

TVA, 98 S.Ct. at 2298-2302.

The Court joins every other federal court to examine the issue, and concludes these findings have a rational basis.[19] *See, e.g., Gibbs,* 214 F.3d at 496 ("The full payoff of conservation in the form of tourism, research, and trade may not be foreseeable. Yet it is reasonable for Congress to

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[19] "The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel v. Virginia Surface Mining & Reclamation Ass'n. Inc.*, 452 U.S. 264, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981).

decide that conservation of species will one day produce a substantial commercial benefit to this country and that failure to preserve a species will result in permanent, though unascertainable, commercial loss."); *NAHB,* 130 F.3d at 1050 ("The Committee Reports on the ESA reveal that one of the primary reasons that Congress sought to protect endangered species from 'takings' was the importance of the continued availability of a wide variety of species to interstate commerce."). Accordingly, the Court finds this third *Morrison* consideration weighs heavily against plaintiffs' claim that the take provision is unconstitutional as-applied in this case.

4. Attenuation of Relationship to Interstate Commerce

The final consideration under *Morrison* is an examination of whether the link between the regulated activity and interstate commerce is direct or attenuated. *See Groome,* 234 F.3d at 214-15. While the regulated activities in *Lopez* (mere possession of a gun near a school) and *Morrison* (committing a violent crime against a woman) required several logical links to connect the activities to some effect on interstate commerce, here the link is direct. Indeed, the Court is hard-pressed to find a more direct link to interstate commerce than a Wal-Mart.

Plaintiffs argue "the activity causing the take (land clearing and runoff from the development of the Plaintiffs' property) . . . [is] *very* distantly removed from the actual take of the species." *See* Plaintiffs' Response, at 14 (emphasis in original). More specifically, plaintiffs contend the link between the development of the Property and the take of the Cave Species is attenuated because (1) the development causes runoff which (2) filters through the ground

and then (3) "migrates through subterranean connections" until (4) it reaches the caves and (5) modifies the Cave Species' habitat. Under this view, every link is attenuated. As a practical and realistic matter, however, the courts treat development activities such as plaintiffs' as the direct cause of a take. *See, e.g., Sweet Home,* 115 S.Ct. at 2412 (assuming "logging activities . . . will have the effect, even though unintended, of detrimentally changing the natural habitat of both [endangered] species"). In addition, the final rule listing the Cave Species as endangered states that "road, industrial, residential, and commercial developments that would adversely affect these species have already begun." *See* 53 Fed.Reg. at 36031. It is these activities that directly harm the species.

In sum, the Court finds defendants' application of the take provision in this lawsuit is a valid regulation of an activity that substantially affects interstate commerce, and therefore is a valid exercise of the Commerce Clause power. Defendants' summary judgment motion is granted in full.

III. Federalism Concerns

Finally, the Court must address plaintiffs' concerns that upholding defendants' application of the take provision in this case will undermine our system of federalism. *See, e.g., Groome,* 234 F.3d at 215 (noting "the central concern of federalism as articulated in *Lopez* and *Morrison* – namely that federalizing certain spheres of authority blurs the federal/state distinction"). Plaintiffs contend allowing defendants to apply the take provision here will undermine the "traditional state authority" to regulate wildlife and land use. *See* Plaintiffs' Brief, at 17-19. While

these are certainly valid concerns, they do not compel a different result here.

First, despite plaintiffs' contention, wildlife conservation has long been regulated by both states and the federal government. *See, e.g.,* Eagle Protection Act of 1940, 16 U.S.C. § 668; Wilderness Act of 1964, 16 U.S.C. § 1131; Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361; Lacey Act of 1981, 16 U.S.C. § 3371. *See also Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 119 S.Ct. 1187, 1204, 143 L.Ed.2d 270 (1999) ("Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers."). Second, while local land use and zoning is generally an area of state concern, "[i]t is well established that Congress can regulate even private land use for environmental and wildlife conservation." *Gibbs,* 214 F.3d at 500; *see also Groome,* 234 F.3d at 216 (upholding federal regulation of local land use through Fair Housing Amendments Act, because "it does not serve the balance of federalism to allow local communities to discriminate against the disabled").

Thus, while defendants' application of the take provision implicates two areas of law often regulated by the states, these areas are not exclusive arenas of state regulation. *Cf. Morrison,* 120 S.Ct. at 1754 ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."). Rather, the states and the federal government share regulation of these areas. And, where preserving endangered species is concerned, the Supreme

Court has indicated that federal law may trump state regulations in both areas. *See Sweet Home,* 115 S.Ct. 2407 (upholding regulatory interpretation of ESA take provision, which protected wildlife on purely private lands, as reasonable interpretation of Congress' intent under the ESA). This Court will not hold otherwise.

Conclusion

The take provision of the Endangered Species Act may not be the ideal federal statute. By its broad terms, it certainly covers purely local, intrastate activities having no connection whatsoever with interstate commerce. But that is not how the take provision has been applied here. The activity regulated in this case is clearly connected to interstate commerce.

Plaintiffs understandably are frustrated by defendants' conduct.[20] Defendants may have applied the take provision to plaintiffs in an unreasonable manner. That, however, does not make defendants' application *unconstitutional,* which is the only issue in this lawsuit. Similarly, plaintiffs may disagree with defendants' decision to apply the take provision in a manner that overwhelmingly favors species preservation at the expense of important local development. However, the Supreme Court has been "emphatic" that the courts are not the place for this balancing. *See TVA,* 98 S.Ct. at 2298. Plaintiffs' commercial development activities clearly fall within the broad

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[20] Indeed, the Court has already found defendants' conduct in handling plaintiffs' Section 10(a) permit applications was "totally irresponsible" and "simply wrong."

reach of the ESA's take provision. If plaintiffs are unhappy with the scope of this thirty-year old statute, they must turn to Congress for relief.

The Commerce Clause certainly has limits. But those limits are not implicated in this lawsuit. The regulated activity at issue here substantially affects interstate commerce. Accordingly, defendants are entitled to summary judgment on all plaintiffs' claims.

In accordance with the foregoing:

IT IS ORDERED that Plaintiffs' Summary Judgment Motion [#25] is DENIED;

IT IS FURTHER ORDERED that Defendants' Summary Judgment Motion [#30] is GRANTED; and

IT IS FINALLY ORDERED all remaining pending motions are DISMISSED AS MOOT.[21]

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[21] In this opinion and order, the Court has in no way relied on the amicus briefs submitted by the National Wildlife Foundation or by the Pacific Legal Foundation and Texas Justice Foundation, and has not relied on the Declaration of Darrell Ubick, which plaintiffs seek to strike.

2004 WL 396975
362 F.3d 286

United States Court of Appeals,
Fifth Circuit.

GDF REALTY INVESTMENTS, LTD.;
Parke Properties I, LP; Parke Properties II, LP,
Plaintiffs-Appellants,

v.

Gale A. NORTON, Secretary, U.S. Department of the Interior; Marshall P. Jones, Director, U.S. Fish & Wildlife Service, Defendants-Appellees.

No. 01-51099.

Feb. 27, 2004.

Appeal from the United States District Court for the Western District of Texas; Sam Sparks, Judge.

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion *March 26, 2003, 5th Cir., 326 F.3d 622*)

Before *DAVIS*, *BARKSDALE* and *DENNIS*, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R.APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

EDITH H. JONES, Circuit Judge, joined by *E. GRADY JOLLY*, *JERRY E. SMITH*, *DeMOSS*, *EDITH BROWN CLEMENT* and *PICKERING*, Circuit Judges, dissenting from the denial of rehearing en banc:

A majority of the court has refused to rehear this significant Endangered Species Act case *en banc*. I respectfully dissent. For the sake of species of 1/8-inch-long cave bugs, which lack any known value in commerce, much less interstate commerce, the panel crafted a constitutionally limitless theory of federal protection. Their opinion lends new meaning to the term *reductio ad absurdum*.

The panel holds that because "takes" of the Cave Species ultimately threaten the "interdependent web" of all species, their habitat is subject to federal regulation by the Endangered Species Act. Such unsubstantiated reasoning offers but a remote, speculative, attenuated, indeed more than improbable connection to interstate commerce. Chief Justice Marshall stated in *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821), that Congress has no general right to punish murder or felonies generally. Surely, though, there is more force to an "interdependence" analysis concerning humans, and thus a more obvious series of links to interstate commerce, than there is to "species." Yet the panel's "interdependent web" analysis of the Endangered Species Act gives these subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victim in *Morrison*. The panel's commerce clause analysis is in error.

I. Background

To recap the facts, this case involves a 20-year effort to develop a large tract of land west of Austin, Texas. This once-rural property contains a cluster of limestone caves. After obtaining all necessary state and local permits, the landowner-appellants began commercial development. Between 1988 and 1993, however, the United States Fish

and Wildlife Service ("FWS"), designated six species ("Cave Species") of tiny bugs, which dwell solely in the caves and never emerge on the surface of the land, as endangered under section 4 of the ESA. *See* 16 U.S.C. § 33(a)(1). Pursuant to section 9(a)(1) of the ESA, it became unlawful to take a member of the endangered species. A "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect. . . . " 16 U.S.C. § 1532(19). The ESA broadly defines "harm" as including significant modifications or degradations of a habitat which kill or injure protected wildlife "by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3.

After years of wrangling with and attempting to appease the FWS, the landowners remained unable to commercially develop their land. Accordingly, they sued on the theory that the ESA "take" provision is unconstitutional as applied to these Cave Species. The district court granted summary judgment to FWS, finding that it would be "hard-pressed to find a more direct link to interstate commerce than a Wal-Mart." *GDF Realty Investments, Ltd. v. Norton,* 169 F.Supp.2d 648, 662 (W.D.Tex.2001). On appeal, the panel affirmed the district court's judgment on wholly different grounds.

II. Discussion

Congress's power "to regulate commerce . . . among the several states . . . " is, like all enumerated powers, subject to outer limits. *See United States v. Lopez,* 514 U.S. 549, 556-57, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159, 173, 121 S.Ct. 675, 148 L.Ed.2d

576 (2001) (reiterating that "the grant of authority to Congress under the commerce clause, though broad, is not unlimited"). The commerce clause "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones and Laughlin Steel,* 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed. 893 (1937).

It is unnecessary to recapitulate the Supreme Court's *Lopez* and *Morrison* cases at any length. *See, generally, United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). *Lopez* defines three categories of federal regulation that are consistent with the commerce clause. *Lopez,* 514 U.S. at 558, 115 S.Ct. 1624. At issue here is whether federal regulation of the Cave Species is permissible under the third *Lopez* category – i.e., whether takes of the Cave Species "substantially affect interstate commerce." *Lopez,* 514 U.S. at 558-59, 115 S.Ct. 1624.[1]

In *Lopez,* reiterated in *Morrison,* the Court outlined four considerations in determining whether purely intrastate activity substantially affects interstate commerce: (1) the commercial or economic nature of the intrastate activity; (2) the presence of a jurisdictional element in the statute; (3) the existence of congressional findings or legislative history demonstrating a link between the

[1] The panel found, and the parties do not dispute, that the first two *Lopez* categories, involving the channels or instrumentalities of interstate commerce, do not justify regulation of the Cave Species. *GDF Realty,* 326 F.3d at 629.

regulated activity and interstate commerce; and (4) how attenuated is the link between the intrastate activity and its effect on interstate commerce. *See Morrison,* 529 U.S. at 609-12, 120 S.Ct. 1740 (2000).[2]

In certain instances, an intrastate activity alone may substantially affect interstate commerce. *See Jones and Laughlin Steel,* 301 U.S. at 22, 57 S.Ct. 615 (NLRB order concerning unfair labor practices at a steel mill directly affected interstate commerce). In other instances, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho,* 311 F.3d 589, 599 (5th Cir.2002); *see also Wickard v. Filburn,* 317 U.S. 111, 127-28, 63 S.Ct. 82, 87 L.Ed. 122 (1942).

As an initial matter, the panel correctly determined, unlike other courts, that the "regulated activity" under the ESA is Cave Species *takes*, not the appellants' planned commercial development of the land. *GDF Realty,* 326 F.3d at 633-34 (recognizing that "looking beyond the regulated activity . . . would 'effectually obliterate' the limiting purpose of the Commerce Clause") (citing *Jones and Laughlin Steel,* 301 U.S. at 37, 57 S.Ct. 615); *Ho,* 311 F.3d at 602 (recognizing that the regulated activity at issue was asbestos removal, rather than the plaintiff's commercial

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[2] Pertinent parts of the Endangered Species Act contain no statutory jurisdictional link between federal regulation and interstate commerce. Likewise, legislative history and congressional findings fail to tie species protection to commerce. These parts of the analysis concerning federal regulation of intrastate activity do not favor FWS.

enterprise); *but see Rancho Viejo, LLC v. Norton,* 323 F.3d 1062 (D.C.Cir.2003) (finding that the regulated activity was not the ESA take but rather the "construction of a commercial housing development").

Next the panel examined whether Cave Species takes, alone, have a "direct relationship" with and substantial effect on interstate commerce. *GDF Realty,* 326 F.3d at 637. FWS offered two theories for such a "direct relationship:" (1) the "substantial" scientific interest the Cave Species generate; and (2) possible future commercial benefits. The panel properly rejected each argument as speculative or too attenuated to commerce.

The panel finally turned to FWS's argument that Cave Species takes, although intrastate and non-economic in themselves, may be aggregated with all other endangered species, permitting the entirety of the regulatory scheme to pass constitutional muster.[3] "At issue is what circumstances must be present in order to justify aggregation when, as in this case, intrastate activity has a *de minimis* effect on interstate commerce." *GDF Realty,* 326 F.3d at 638. The panel concluded that this case warranted aggregation under *Lopez* and *Morrison,* because FWS's actions are essential to preserving an "economic" regulatory program. *Id.* at 639. I respectfully disagree. The panel's approval of aggregation in this case would not only sustain every conceivable application of the ESA, but entirely undercuts *Lopez* and *Morrison.*

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[3] The appellants concede that, if aggregated with all endangered species, the Cave Species takes would have a substantial effect on interstate commerce.

To explain the problem, a brief historical review of the aggregation principle is required. This court recognized in *Ho* that the aggregation principle "reached its zenith in *Wickard,* 'perhaps the most far-reaching example of commerce clause authority over intrastate activity.'" *Ho,* 311 F.3d at 599 (quoting *Lopez,* 514 U.S. at 560, 115 S.Ct. 1624). In *Wickard,* the Supreme Court upheld regulation of an intrastate farmer's personal consumption of home-grown wheat under the Agricultural Adjustment Act of 1938 because, " . . . his contribution [to the wheat market], taken together with that of many others similarly situated, is far from trivial." *Wickard,* 317 U.S. at 127-28, 63 S.Ct. 82. A primary purpose of the act in question was, as the Court noted, "to increase the market price of wheat and to that end to limit the volume thereof that could affect the market." *Id.* at 90-91.

After *Wickard,* the Court has sustained commerce clause legislation using aggregation in instances where Congress was regulating commercial activity. *See Katzenbach v. McClung,* 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964) (prohibiting refusal of restaurant service to interstate travelers); *Heart of Atlanta Motel v. United States,* 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (prohibiting refusal of hotel accommodations to interstate travelers); *Maryland v. Wirtz,* 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968) (regulating wages of employees of business engaged in interstate commerce); *Perez v. United States,* 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed.2d 686 (1971) (regulating loan sharking); *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981) (regulating coal industry); *see Lopez,* 514 U.S. at 560, 115 S.Ct. 1624 (recognizing

these "examples are by no means exhaustive, but the pattern is clear").

In both *Lopez* and *Morrison*, by contrast, the federal government's efforts to sustain non-economic criminal laws under the commerce clause through aggregation were rebuffed. In *Lopez*, only Justice Breyer's dissent accepted the theory that discrete instances of gun possession in a school zone, when aggregated, increased the costs of crime and reduced national productivity so as to justify the Gun-Free School Zones Act of 1990. *See Lopez*, 514 U.S. at 618-624, 115 S.Ct. 1624 (Breyer, J. dissenting). The Court majority rejected aggregation, because it would allow Congress to regulate "all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.* at 564, 115 S.Ct. 1624. The Court concluded that, "if we were to accept the government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.*

Likewise, in *Morrison*, the Court rejected arguments concerning the aggregate effects of sex-based crime on national productivity, increased medical and other costs, and a decreased supply and demand for interstate goods. *Morrison*, 529 U.S. at 615, 120 S.Ct. 1740. Again, the Court concluded that aggregation "would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit or consumption." *Id.* (adding that "the concern we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well-founded") (citing *Lopez*, 514 U.S. at 564, 115 S.Ct. 1624).

Together, these cases strongly suggest that when the Supreme Court has sustained Commerce Clause regulation under the aggregation principle, "the regulated activity was of an apparent commercial character." *Morrison,* 529 U.S. at 611, 120 S.Ct. 1740. Nevertheless, *Morrison* declined to create a categorical rule "against aggregating the effects of non-economic activity," even as it observed, "thus far in our nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where the activity is economic in nature." *Id.* at 613, 120 S.Ct. 1740.

The panel recognized that "[i]n light of *Lopez* and *Morrison,* the key question for purposes of aggregation is whether the nature of the regulated activity is economic." *GDF Realty,* 326 F.3d at 630. The panel conceded that "in a sense, Cave Species takes are neither economic nor commercial. There is no market for them; any future market is conjecture." *GDF Realty,* 326 F.3d at 638. The panel added that "[i]f the speculative future medical benefits from Cave Species makes their regulation commercial, then almost anything would be." *Id.* Furthermore, "there is no historic trade in the Cave Species, nor do tourists come to Texas to view them." *Id.* Finally, the panel rejected the government's argument that Cave Species takes become commercial in character once aggregated with other endangered species. *Id.* "To accept such a justification would render meaningless any 'economic nature' prerequisite to aggregation." *Id.*

Nevertheless, the panel aggregated the Cave Species takes with all takes of all endangered species because: (1) they are part of a larger regulation that is "directed at activity that is economic in nature" and (2) the intrastate activity (Cave Species takes) is an "essential part of the

economic regulatory scheme." *Id.* at 639 (internal citations and quotations omitted).

How the panel's conclusion follows from its generally excellent preceding discussion of *Lopez* and *Morrison,* I cannot fathom. The panel offers little reasoning why any take of a Cave Species is (a) part of a larger "economic" regulatory scheme; (b) so essential to the larger national scheme that the accidental crushing of one Cave Species underfoot (or even the diminutive species' destruction) threatens to undo the national program; and (c) so significant to the commerce clause that Congress, for the first time in U.S. history, is authorized to aggregate purely intrastate, non-economic activity.

It is undeniable that many ESA-prohibited takings of endangered species may be regulated, and even aggregated, under *Lopez* and *Morrison* because they involve commercial or commercially-related activities like hunting, tourism and scientific research. On this basis, the Fourth Circuit decision in *Gibbs v. Babbitt,* 214 F.3d 483, 493-96 (4th Cir.2000), approved federal red wolf regulations. Under reasoning like that in *Gibbs,* aggregation may be sustained on a species-by-species basis or across certain categories of species. The pursuit of hunting trophies, for instance, affects markets for hunting, outfitting, taxidermy, etc. Where the link between endangered species takes and commercial or economic activity is plain, courts need not be concerned about the limits of the aggregation principle.

But in this case, there is no link – as the panel concedes – between Cave Species takes and *any* sort of commerce, whether tourism, scientific research, or agricultural markets. Compare *Gibbs,* 214 F.3d at 493-95. The cautions

expressed in *Morrison* about aggregation of wholly intrastate non-economic activity should be taken seriously by the courts. *See GDF Realty,* 326 F.3d at 628. Elsewhere in its opinion, the panel was quite emphatic about this, saying "the *possibility* of future substantial effects of the Cave Species on interstate commerce . . . is simply too hypothetical and attenuated from the regulation to pass constitutional muster." *Id.* (citing *Morrison,* 529 U.S. at 612, 120 S.Ct. 1740) (emphasis in original).

When the panel nevertheless approves the application of the ESA to these Cave Species, its opinion becomes confusing and self-contradictory. First, the panel attempts to convert the ESA to an economic regulatory statute by opining that the majority of species takes would result from economic activity, and "the Cave Species takes would occur as a result of plaintiffs' planned commercial development." *GDF Realty,* 326 F.3d at 639. The panel had, however, rejected this argument earlier, when it found that the regulated activity is the take, not the planned commercial land development. *GDF Realty,* 326 F.3d at 633-34. As the panel itself understood, this "analysis would allow application of otherwise unconstitutional statutes to commercial actors, but not non-commercial actors. There would be no limit to Congress' authority to regulate intrastate activities, so long as those subjected to the regulation were entities which had an otherwise substantial connection to interstate commerce." *Id.* at 634.[4]

[4] Arguably, Congress could pass a statute prohibiting anyone engaged in interstate commerce from "taking" endangered species. But Congress did not do so in these parts of the statute.

Second, the panel states that Cave Species takes are essential to the ESA, because any take of any species "threaten[s] the interdependent web of all species." *GDF Realty,* 326 F.3d at 640 (internal quotations omitted). Under the panel's approach, "the essential purpose of the ESA is to protect the ecosystems upon which we and other species depend." *Id.* (quoting H.R.Rep. No. 93-412, at 10). Further, every take is "essential" to the ESA because the extinction of any species risks the extinction of all species, and the extinction of all species could lead to the extinction of ecosystems. *GDF Realty,* 326 F.3d at 640. At one level, this is no more than the "but-for-causal chain" approach twice rejected by the Supreme Court in *Lopez* and *Morrison.* Hence, "the *Lopez* Court declined to apply the aggregation principle in conjunction with long chains of causal inference that would have been necessary to arrive at a substantial effect on interstate commerce." *United States v. Wang,* 222 F.3d 234, 239 (6th Cir.2000). An even more obvious dissonance between the panel opinion and *Lopez, Morrison* and the Constitution is that the Commerce Clause regulates commerce, not ecosystems.[5]

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[5] That a true, not merely conjectural, economic activity must be the subject of Congress's regulation is reinforced by our court's debates over the Hobbs Act. In *United States v. Robinson,* 119 F.3d 1205 (5th Cir.1997), the panel reasoned that any robbery of a business that has an effect on interstate commerce under the Hobbs Act's express jurisdictional requirements may be aggregated with other similar crimes for purposes of establishing a "substantial effect." Here, there is no jurisdictional element, and the only aggregate effect articulated by the panel is on biodiversity, which the panel somehow equates with "economic" or commercial activity. It seems clear, though, that biodiversity is a condition of nature, not a human activity. The panel's opinion

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Third, while the panel acknowledges the Supreme Court's concern that federal legislation under the Commerce Clause must have a limiting principle so as not to obliterate the distinction between that which is truly national and that which is local, the panel's conclusion tramples that precept. The panel concludes, summarily, that its "interdependent web" approach "will not allow Congress to regulate land use or wildlife preservation." *GDF Realty,* 326 F.3d at 640. I disagree. Once the FWS designates a species as endangered, the Government has functional control over the land designated as its habitat. If such authority is not justified by a federal interest in regulating interstate commerce, it "would result in a significant impingement of the States' traditional and primary power over land and water use." *Solid Waste Agency,* 531 U.S. at 173-74, 121 S.Ct. 675.[6]

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goes farther than *Robinson* in permitting aggregation to overcome a commerce clause challenge.

[6] Contrary to recent Supreme Court authority, the panel interprets the Endangered Species Act extremely broadly to permit the federal government to regulate a matter of unique local concern. *See Solid Waste Agency,* 531 U.S. at 172-173, 121 S.Ct. 675 (Congressional authority must be narrowly construed "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."). Further, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress" *Id.* (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988)). *Id.* Regulation of land use is traditionally the province of state and local governments. *Hess v. Port Auth. Trans-Hudson Corp.,* 513 U.S. 30, 44, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994).

Perversely, federal protection of the Cave Species has become a device to thwart not only these appellants' prospects of land development but also the State's construction of a highway, the quintessential modern artery of commerce. *See* "Dateline Texas: Officials at Odds over Spider Habitat," *Houston Chron.,* Feb. 22, 2004, at 35A (to get federal approval for highway construction over two limestone caverns housing the Cave Species, "state highway administrators must find a site in Williamson County that is also home to the endangered species and permanently preserve that site").

The panel also concludes, without explanation, that "the link" between Cave Species takes "and a substantial commercial effect is not attenuated." *GDF Realty,* 326 F.3d at 640. The panel's reasoning – all takes are essential, therefore, all takes have a substantial commercial effect – is circular. Even aside from this problem, the Fifth Circuit and other courts have recognized that in an otherwise constitutional federal regulatory scheme, some applications may go too far. *See e.g., United States v. Collins,* 40 F.3d 95, 99 (5th Cir.1994) (robbery of an individual citizen not covered under the Hobbs Act); *United States v. Wang, supra* (same); *United States v. Quigley,* 53 F.3d 909, 910-11 (8th Cir.1995). In fact, the panel's reasoning contradicts *Collins,* inasmuch as it would authorize federal criminal prosecution under the ESA of a landowner, or even an FWS agent, who climbed down into one of the caves in order to study the Cave Species and crushed one. *See* 16 U.S.C. §§ 1538-1540; compare *Rancho Viejo, supra,* 323 F.3d at 1080 (Ginsburg, J., concurring) (" . . . our rationale for concluding the take of the arroyo toad affects interstate commerce does indeed have a logical stopping point . . . Just as important, however, the lone hiker in the woods, or

the homeowner who moves dirt in order to landscape his property, though he takes the toad, does not affect interstate commerce.").

In the end, the panel is unable to refute the attenuation concern of *Lopez* and *Morrison* because its analysis rests on the false implication that all takes of all species necessarily relate to an ecosystem, which by its very grandiosity must at some point be "economic" in actuality or in effect. This is precisely the reasoning rejected by the Supreme Court. Not all crime is "economic" for commerce clause purposes, in actuality or effect, even though any or all of its human victims may become impoverished. Not all crimes against women are "economic" in practicality or effect, despite the same possible consequences. The Commerce Clause does not regulate crime, sexual inequity, or ecosystems as such – it regulates commerce. Thus, I reiterate: many applications of the ESA may be constitutional, but this one simply goes too far. To be faithful to the Supreme Court's principles in *Lopez* and *Morrison* and this court's Commerce Clause decisions, we should rehear this case *en banc*.

PERTINENT STATUTORY PROVISIONS

Section 9(A)(1) of the Endangered Species Act, 16 U.S.C. §1538(A)(1), states: "[W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to . . . (B) take any such species within the United States or the territorial sea of the United States; . . . "

Section 3(19) of the Endangered Species Act, 16 U.S.C. §1532(19), states: "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

Section 11(a)(1) of the Endangered Species Act, 16 U.S.C. §1540(a)(1), states: "Any person who knowingly violates, . . . any provision of this chapter, . . . or of any regulation issued in order to implement subsection (a)(1) . . . (B), . . . may be assessed a civil penalty by the Secretary of not more than $25,000 for each violation. . . . Each violation shall be a separate offense. . . . "

Section 11(b)(1) of the Endangered Species Act, 16 U.S.C. §1540(b)(1), states: "Any person who knowingly violates any provision of this chapter, . . . , or of any regulation issued in order to implement subsection (a)(1) . . . (B), . . . of section 1528 of this title, shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both."

"Harm" in the definition of "take" in the Endangered Species Act has been administratively defined by the United States Fish & Wildlife Service to mean "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills

or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."

50 C.F.R. §17.3.